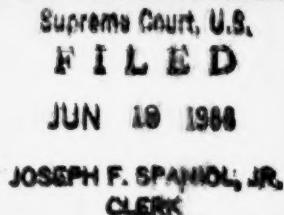


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87-2073

Case No.

In The



SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD L. DUGGER, Secretary, Florida
Department of Offender Rehabilitation

Petitioner,

v.

LARRY EUGENE MANN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

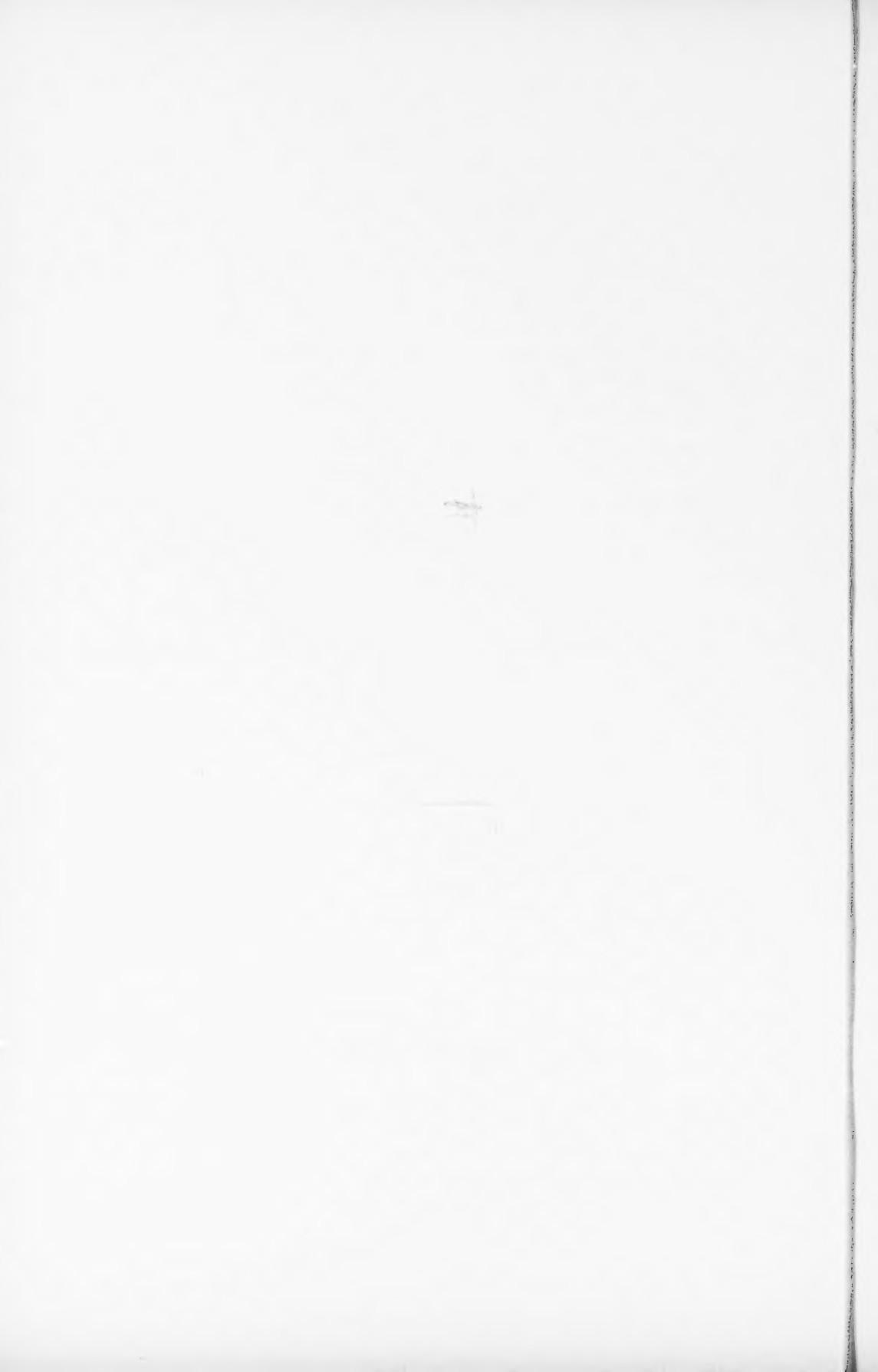
AND APPENDIX

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152 P



QUESTION PRESENTED

I.

MAY A FEDERAL COURT CONSIDER A PROCEDURALLY DEFAULTED ISSUE THAT HAD NOT BEEN RAISED ON DIRECT APPEAL ON THE GROUNDS THAT AMBIGUOUS LANGUAGE BY THE STATE APPELLATE COURT IN DENYING POST CONVICTION PROCEEDINGS CONSTITUTED A RULING ON THE MERITS WHERE THE POST CONVICTION PROCEEDINGS WERE NOT THE PROPER FORUM TO RAISE THE ISSUE AND THE MERITS WERE NOT DISCUSSED BY THE STATE APPELLATE COURT?

II.

WHETHER INFORMING A FLORIDA CAPITAL JURY, WHICH PROVIDES AN ADVISORY SENTENCE TO THE SENTENCING JUDGE, THAT THEIR ROLE IS ONLY ADVISORY AND THAT THE ULTIMATE SENTENCE IS NOT ON THEIR SHOULDERS RENDERS THE TRIAL COURT'S SENTENCE VIOLATIVE OF THE EIGHTH AMENDMENT VIS A VIS CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985)?

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I

THE EN BANC OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEAL IS IN EXPRESS AND IRRECONCILABLE CONFLICT WITH THE FLORIDA SUPREME COURT AS TO THE PROPER APPLICATION OF THIS COURT'S DECISION IN CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), TO THE FLORIDA CAPITAL SENTENCING SCHEME.

II.

THE GROUNDS UPON WHICH THE ELEVENTH CIRCUIT COURT OF APPEAL EXCUSED THE PROCEDURAL DEFAULT OF THE EIGHTH AMENDMENT CLAIM RESULTS IN A COMPLETE EMASCULATION OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977).

III.

THERE IS EXPRESSED CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL AS TO WHAT CONSTITUTES A DISCUSSION OF THE MERITS OF A CONSTITUTIONAL CLAIM IN A STATE APPELLATE OPINION SO AS TO ALLOW FEDERAL COURTS TO ENTERTAIN A PROCEDURALLY DEFaultED ISSUE.

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OPINIONS BELOW

The en banc opinion of the Court of Appeal, Eleventh Circuit, in Mann v. Dugger, Case No. 86-3182, was rendered on April 21, 1988, and is attached as an appendix to the instant petition. At the time of the preparation of the instant petition, there has been no official reporter citation assigned to the en banc decision of the Court of Appeal. The opinion of the Circuit Court of Appeal granting rehearing en banc and vacating the panel opinion is reported as Mann v. Dugger, 828 F.2d 1498 (11th Cir. 1987). The panel opinion of the Court of Appeals, Eleventh Circuit, is reported as Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987). The opinion of the Florida Supreme Court Court denying a petition for writ of habeas corpus and affirming the denial of the motion for post conviction relief is reported as Mann v. State, 482 So.2d 1360 (Fla. 1986). The direct appeal in

state court which affirmed the judgment and sentence is reported as Mann v. State, 453 So.2d 784 (Fla. 1984). A previous direct appeal, which mandated another sentencing, is reported as Mann v. State, 420 So.2d 578 (Fla. 1982).

JURISDICTIONAL STATEMENT

Jurisdiction to review the en banc judgment of the Eleventh Circuit Court of Appeal rendered on April 21, 1988, is invoked pursuant to 28 U.S.C. §1254(1).

**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED**

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FLA. STAT. §921.141 (1981)

921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty -- Upon conviction or adjudication of guilty of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene

for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to

rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF

DEATH -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceeding. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) Review of Judgment and Sentence --

The judgment of conviction and sentence of death shall be subject of automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating Circumstances --

Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

STATEMENT OF THE CASE

The respondent, Larry Eugene Mann, was found guilty of the first degree murder and kidnapping of ten-year-old Elisa Nelson. After the jury rendered an advisory sentence of death, the trial court sentenced the respondent to death.

The respondent did not raise a Caldwell v. Mississippi, 472 U.S. 320 (1985), claim at trial. The respondent twice appealed his judgment and sentence to the Florida Supreme Court without raising a Caldwell v. Mississippi claim in either of his two direct appeals. Mann v. State, 453 So.2d 784 (Fla. 1984); Mann v. State, 420 So.2d 578 (Fla. 1982). Respondent filed a Motion for Post Conviction Relief raising, inter alia, a Caldwell v. Mississippi claim as Ground VII. The trial court denied the Caldwell v. Mississippi claim on procedural default grounds since the issue could have and should

have been raised on direct appeal. (R1 - 1 - App. tab #9) The respondent appealed the denial of the Motion for Post Conviction Relief and simultaneously petitioned the Florida Supreme Court for a writ of habeas corpus. The Florida Supreme Court affirmed the denial of the Motion for Post Conviction Relief and denied the petition for writ of habeas corpus in a single opinion. (Appendix pages 1 - 10)

Respondent sought relief in federal court vis a vis, a petition for writ of habeas corpus. The United States District Court for the Middle District of Florida denied relief on the Caldwell v. Mississippi claim stating that the claim was procedurally defaulted and without merit due to a curative instruction. (R3 - 26 - 18, 19) On appeal to the United States Court of Appeals for the Eleventh Circuit, an initial panel opinion affirmed the denial of the petition as to the

conviction, but held that the prosecutor's and the court's comments to the jury, which in substance consisted of apprising the jury that their role was merely advisory and that the trial judge was the ultimate sentencer, mislead the jury; thereby rendering the sentencing proceeding and the resulting death sentence infirm on Eighth Amendment grounds. Petitioner sought and obtained rehearing en banc in the Circuit Court of Appeal. The en banc opinion of the Circuit Court of Appeal (appendix pages 11 - 96) determined that: (1) the Florida Supreme Court excused the multiple procedural defaults of the Caldwell v. Mississippi claim and entertained the claim during the combined appeal from the denial of the Motion for Post Conviction Relief and the petition for writ of habeas corpus since the Florida Supreme Court's opinion stated "[a] comparison of the original trial record clearly and

conclusively refutes any claim that there was any constitutional infirmity in the trial." Mann v. Dugger, slip opinion page 27 n. 4 (11th Cir. Case No. 86-3182, decided April 21, 1988), citing Mann v. State, 482 So.2d 1360 at 1362 (Fla. 1986); and (2) that the Florida capital sentencing scheme allotted a substantive sentencing role to the jury, and as such, any misleading statements to the jury concerning that role tainted the trial court's sentencing decision. Applying the above determination of the jury's role in the Florida sentencing scheme, the Circuit Court of Appeal determined that informing the jury that the final/ultimate sentencing decision rested with the trial judge, and not with the jury, was misleading. The Circuit Court of Appeal determined that such misleading statements tainted the jury's recommendation and that the trial court's sentencing determination was in turn tainted. Thereafter, the

Circuit Court held that the imposition of the resulting death sentence was violative of the Eight Amendment. Mann v. Dugger, supra at slip opinion page 25., appendix page 53.

REASONS FOR GRANTING THE WRIT

I.

THE EN BANC OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEAL IS IN EXPRESS AND IRRECONCILABLE CONFLICT WITH THE FLORIDA SUPREME COURT AS TO THE PROPER APPLICATION OF THIS COURT'S DECISION IN CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), TO THE FLORIDA CAPITAL SENTENCING SCHEME.

II.

THE GROUNDS UPON WHICH THE ELEVENTH CIRCUIT COURT OF APPEAL EXCUSED THE PROCEDURAL DEFAULT OF THE EIGHTH AMENDMENT CLAIM RESULTS IN A COMPLETE EMASCULATION OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977).

III.

THERE IS EXPRESSED CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL AS TO WHAT CONSTITUTES A DISCUSSION OF THE MERITS OF A CONSTITUTIONAL CLAIM IN A STATE APPELLATE OPINION SO AS TO ALLOW FEDERAL COURTS TO ENTERTAIN A PROCEDURALLY DEFULTED ISSUE.

ARGUMENT

I.

THE EN BANC OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEAL IS IN EXPRESS AND IRRECONCILABLE CONFLICT WITH THE FLORIDA SUPREME COURT AS TO THE PROPER APPLICATION OF THIS COURT'S DECISION IN CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), TO THE FLORIDA CAPITAL SENTENCING SCHEME.

In the instant opinion sought to be reviewed by this petition, the Eleventh Circuit Court of appeal held that a description of a Florida capital jury's role as being merely advisory, statements by the trial court that the trial judge was the ultimate sentencer, and informing the jury that the final sentencing decision was not on the jury's shoulders resulted in a denigration of the jury's sentencing role and that such a denigration violated the Eighth Amendment under this Court's decision in Caldwell v. Mississippi, 472 U.S. 320 (1985). This holding is

in irreconcilable conflict with every decision of the Florida Supreme Court on this point. Grossman v. State, 13 F.L.W. 127 (Fla. Case No. 68,096 decided February 18, 1988); Combs v. State, 13 F.L.W. 142 (Fla. Case No. 68,477 decided February 18, 1988); Jackson v. State, 13 F.L.W. 146 (Fla. Case No. 68,097 decided February 18, 1988); Ford v. State, 522 So.2d 345 (Fla. 1988); Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Pope v. Wainwright, 496 So.2d 798 (Fla. 1986); Smith v. State, 515 So.2d 182 (Fla. 1987). Furthermore, the Eleventh Circuit has ruled that the Florida Supreme Court excused the procedural default on the Caldwell claim when the Florida Supreme Court has, without exception, held that either the failure to object at the trial level or the failure to raise the matter on direct appeal results in a procedural default of Caldwell claim. Jackson v. State, supra; Ford v. State, supra;

Aldridge v. State, supra; Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987); Foster v. State, 518 So.2d 901 (Fla. 1988); Phillips v. Dugger, 515 So.2d 227 (Fla. 1987)

The language of the state appellate opinion used by the Eleventh Circuit Court of Appeal to rationalize its finding that the Florida Supreme Court, in an appellate opinion reviewing the denial of a motion for post conviction relief, had reached the merits of Caldwell claim was a statement in the Florida Supreme Court's opinion that the record clearly and conclusively refuted any claim of constitutional infirmity in the trial. Mann v. Dugger, slip opinion page 27 at n.4, appendix pages 56 - 57. This language was rendered from a combined appeal from a summary denial of a Motion for Post Conviction Relief and a petition for writ of habeas corpus, Mann v. Dugger, 482 So.2d 1360 (Fla. 1986), and was only responsive to an

ineffective trial/appellate counsel claim since a Caldwell claim may not be entertained collaterally in Florida. Ford v. State, supra; Aldridge v. State, supra; Copeland v. Wainwright, supra; Foster v. State, supra; Phillips v. Dugger, supra.

Petitioner respectfully submits that the irreconcilable conflict between the Florida Supreme Court and the Eleventh Circuit Court of Appeal on both the merits of the Caldwell claim and the procedural bar to entertainment of the issue warrants this Court's exercise of certiorari jurisdiction since the merits issue impacts upon every post 1976 death sentence in Florida and the excusal of the procedural default by federal courts on such a tentative basis creates unbearable friction between the federal and state judiciary as a result of federal belittlement of state procedural rules which serve Florida's legitimate interests in finality and judicial

economy. This Court has previously recognized the certiorari worthiness of both issues by its acceptance on March 7, 1988, of the Caldwell issue in Dugger v. Adams, 108 U.S. 1106 (1988), and the procedural default issue in Harris v. Reed, 108 S.Ct. 1107 (1988). As such, petitioner prays that this Court grant certiorari as to both issues presented for review and entertain expeditious briefings of the issues in light of their importance.

II.

THE GROUNDS UPON WHICH THE ELEVENTH CIRCUIT COURT OF APPEAL EXCUSED THE PROCEDURAL DEFAULT OF THE EIGHTH AMENDMENT CLAIM RESULTS IN A COMPLETE EMASCULATION OF WAINWRIGHT V. SYKES, 433 72 (1977).

The opinion of the Eleventh Circuit Court of Appeal sought for review by the instant petition excused the procedural default of the Caldwell v. Mississippi claim at both the state trial and direct appeal levels on the grounds that ambiguous language, void of any discussion of the merits, in the Florida Supreme Court's opinion rendered in a collateral attack setting excused the default and entertained the Caldwell claim on the merits. Mann v. Dugger, slip opinion pg. 27, n.4, appendix pg. 56 - 57. Whereas (1) a Florida collateral forum is an improper setting in which to litigate a Caldwell claim and the Florida Supreme Court has consistently held that the issue will "not be

entertained collaterally, "Ford v. State,
supra, and (2) the trial court specifically
ruled that the Caldwell claim was
inappropriate for collateral entertainment
since it was an issue which should have been
raised on direct appeal (Rl - 1 - App. tab
#9), the Eleventh Circuit Court of Appeal's
reliance on such ambiguous language has in
essence created a de facto presumption that
ambiguous language in a state appellate opin-
ion is a ruling on the merits of a constitu-
tional claim exclusive of the factual or
legal setting in which the ambiguous language
was rendered. Petitioner would note that
such a de facto presumption is contrary to
this Court's declaration that a lack of
discussion of a constitutional question in a
state appellate opinion will be presumed a
product "of the want of proper presentation
in state courts, unless the aggrieved party .
. . can affirmatively show to the

contrary." Street v. New York, 394 U.S. 576 at 582 (1969). See also Fuller v. Oregon, 417 U.S. 40, 50 n.11 (1974); Exxon Corp. v. Eagerton, 462 U.S. 176, 181 at n.3 (1983); and Webb v. Webb, 451 U.S. 493 at 495 (1981). Notwithstanding the merits of the above mentioned excusal of the procedural default, petitioner respectfully submits that the excusal of the default in the manner the Circuit Court has done so in the instant case would, for all practical matters, permit federal courts to indulge in speculation as a sufficient legal basis for executing ad hoc end runs around the procedural default bars to habeas corpus relief without providing for the legitimate policy reasons behind the procedural default doctrine enunciated in Wainwright v. Sykes, 433 U.S. 72 (1977). The resulting impact would be relitigation of the majority of state judgments and sentences in federal courts with no deference to concepts

of comity and a complete denigration of the perception of a state criminal trial as a "decisive and portentous event." The resulting overwhelming cost to society as a result of the marginal expenditures of both financial and judicial resources along with further denigration of the criminal justice system warrants this Court's exercise of certiorari jurisdiction in the instant cause.

III.

THERE IS EXPRESSED CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL AS TO WHAT CONSTITUTES A DISCUSSION OF THE MERITS OF A CONSTITUTIONAL CLAIM IN A STATE APPELLATE OPINION SO AS TO ALLOW FEDERAL COURTS TO ENTERTAIN A PROCEDURALLY DEFAULTED ISSUE.

In the instant case sought for review, the Eleventh Circuit Court of Appeal entertained a defaulted issue on the merits under the authority of Oliver v. Wainwright, 795 F.2d 1524, 1528 - 1529 (11th Cir. 1986). Mann v. Dugger, slip opinion at pg. 27 n.4, appendix pages 163 - 164. Oliver, supra, presumes that a silent state opinion addressed the merits of a constitutional claim, and as such, federal district courts should likewise address the merits of a constitutional claim. Oliver at 1529. Not only does such a position conflict with this Court's decisions in Street v. New York, supra, and its progeny as discussed in reason II of this petition,

it is in conflict with overt declarations of other Circuit Courts of Appeal. The Second Circuit Court of Appeal normally interprets a silent state opinion as a decision resting on procedural grounds, Stepney v. Lopes, 760 F.2d 40 at 44 (2nd Cir. 1985), while treating ambiguous language in a state opinion as a ruling on the merits, Rosenfeld v. Dunham, 820 F.2d 52 at 55 (2nd Cir. 1987). The Fourth Circuit Court of Appeals in essence presumes that silent and/or ambiguous opinions rests on procedural default grounds since it requires a habeas petitioner to make a "clear showing" that the defaulted issue was entertained on the merits. Meadows v. Holland, 831 F.2d 493 at 497 (5th Cir. 1987). The Fifth Circuit Court of Appeal applies a three prong test to both silent and ambiguous state appellate decisions. That inquiry being: (1) does the state apply procedural default in disposing of similarly

situated cases; (2) does the history of the case suggest that the state courts were aware of the procedural default; and (3) whether silence/ambiguity suggests reliance on procedural default or a determination of the merits. Bates v. Blackbu- 805 F.2d 569 at 574 (5th Cir. 1986) and Preston v. Maggio, 705 F.2d 1132 at 116 (5th Cir. 1983). In an ambiguous language setting, the Sixth Circuit Court of Appeal applies a procedural default bar to a constitutional claim as long as the state defended, at least in part, on procedural default grounds in state court. Shepard v. Foltz, 771 F.2d 962 at 965 (6th Cir. 1985). The Seventh Circuit applies a presumption of procedural default to a silent state court opinion, Wallace v. Duckworth, 778 F.2d 1215 (7th Cir. 1985), and would probably do the same to an ambiguous state appellate opinion since the Seventh Circuit recognizes that state opinions resting on

both procedural default grounds and upon the merits of the constitutional claim would be unaffected by a different disposition of the merits since the judgment would then rest entirely on independent state grounds.

Phillips v. Lane, 787 F.2d 208 at 214 (7th Cir. 1985).

From the above, it can be seen that the instant opinion sought for review is not only in conflict with the majority of Circuits, but also, that the state of the law in this area is in disarray and in much need of this Court's guidance. As such, petitioner prays that this Honorable Court exercise its certiorari jurisdiction and order expeditious briefing on the merits.

CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant Certiorari and order expeditious briefing on the merits.

Respectfully submitted,

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Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

**RICHARD L. DUGGER, Secretary, Florida
Department fo Offender Rehabilitation**

Petitioner,

v.

LARRY EUGENE MANN,

Respondent.

APPENDIX

Следует отметить, что в 1980 г. в СССР было выпущено 1000000 тонн крахмала из зерна пшеницы и 150000 тонн из зерна ячменя. В 1981 г. в СССР было выпущено 1000000 тонн крахмала из зерна пшеницы и 150000 тонн из зерна ячменя.

Larry Eugene MANN, Appellant,

v.

STATE of Florida, Appellee.

Nos. 68261, 68262.

Supreme Court of Florida.

Feb. 1, 1986.

Petitioner, who was scheduled for execution, sought postconviction relief. The Circuit Court, Pinellas County, Philip A. Federico, J., denied petitioner's motion for relief. Defendant appealed, and filed petition for habeas corpus in the Supreme Court. The Supreme Court held that: (1) evidentiary hearing was not required on petition for postconviction relief; (2) trial judge did not abuse his discretion by not having oral argument on postconviction relief petition; (3) it was not appropriate in collateral attack on death sentence to attempt to collaterally attack petitioner's prior conviction of a crime of violence in a

foreign jurisdiction; and (4) it was proper to fail to delay execution of sentence prior to ruling in that jurisdiction on collateral attack on the prior conviction.

Order denying postconviction relief affirmed; habeas corpus denied; stay of execution denied.

1. Criminal Law 998(19)

Evidentiary hearing was not required on petition of defendant who had been sentenced to death for postconviction relief, where review of the record belied claim of prosecutorial misbehavior, and defendant's claims for relief were either refuted or insufficient for relief, after review of the record, which included record of two prior appeals.

West's F.S.A. RCrP Rule 3.850.

2. Criminal Law 998(19)

Trial judge did not abuse his discretion by not having oral argument on petitions of defendant sentenced to death for

postconviction relief, where motion and attached memorandum were self-explanatory, motion for relief was filed on January 30 and execution was scheduled for February 4, and trial judge was familiar with the case. West's F.S.A. RCrP Rule 3.850.

3. Criminal Law 998(8)

Habeas Corpus 25.1(6)

Alleged ineffective assistance of trial counsel in failing to object to allegedly improper prosecutorial statements did not justify postconviction or habeas corpus relief, where record belied claim of prosecutorial misbehavior, and the complained of comments which occurred during closing arguments in penalty phase that resulted in death sentence could not be construed to cause substantial harm or material prejudice, and thus, would not have constituted reversible error if raised on appeal. West's F.S.A. RCrP Rule 3.850.

4. Criminal Law 998(13)

Habeas Corpus 30(3)

It is not appropriate in a collateral attack on death sentence in postconviction and habeas corpus relief proceeding to attempt to collaterally attack prior conviction of a crime of violence in another state. West's F.S.A. RCrP Rule 3.850.

5. Criminal Law 1001

It was proper to fail to delay execution of death sentence prior to ruling in foreign state on collateral attack on prior conviction of a crime of violence in that state.

Larry Helm Spalding, Capital Collateral Representative and Steven H. Malone and Mark A. Evans, Asst. Capital Collateral Representatives, St. Petersburg, for appellant-petitioner.

Jim Smith, Atty. Gen., and Michael Kotler, Asst. Atty. Gen., Tampa for appellee/respondent.

PER CURIAM

Larry Eugene Mann, a convicted murderer who is scheduled for execution on February 4, 1986 seeks reversal of a circuit court order denying relief on his motion filed pursuant to rule 3.850, Florida Rules of Criminal Procedure. Mann also seeks relief by way of petition for habeas corpus claiming he was deprived of effective appellate counsel. He further seeks a stay of execution. We deny all relief.

Mann was convicted of first-degree murder and sentenced to death for the slaying of a ten-year-old girl. His first appeal resulted in our affirming his conviction but vacating the original sentence and remanding the cause to the trial judge for a new sentencing hearing. **Mann v. State**, 420 So.2d 578 (Fla. 1982). The trial court resentenced Mann to death and this Court affirmed that sentence. **Mann v. State**, 453 So.2d 784 (Fla.

1984), cert. denied, ___ U.S. ___, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985). The governor signed Mann's death warrant on January 7, 1986.*

[1, 2] Mann filed his motion for relief on January 30, 1986 which was denied on the same day without an evidentiary hearing or oral argument. Our first task is to review the motion to determine if an evidentiary hearing was required. After doing so, we agree with the trial judge that none was. As to not having oral argument, the motion and attached memorandum was self-explanatory,

* When this Court was advised of the signing of Mann's death warrant, we immediately set a proposed oral argument date of January 27th. In doing so we allowed ample time for the filing of appropriate pleadings and a hearing on them at the trial level. The matters under review were not even filed in the trial court until after that scheduled date. Hence, we considered this matter without oral argument and on the written record and arguments filed in the trial court and on the petition for habeas corpus filed in this Court.

and, considering the time constraints and the trial judge's familiarity with this case, the trial judge did not abuse his discretion by not having oral argument.

[3] Mann filed numerous contentions. Among them he claims that his trial counsel was ineffective by failing to object to what Mann now perceives to be improper prosecutorial statements. Our review of the original record belies the claim of prosecutorial misbehavior. Most of the comments complained of occurred during closing arguments in the penalty phase. Considered in the light of the overall argument, had this argument been objected to, at best it would have resulted in an admonishment to the jury to disregard. The comments could not be construed to cause substantial harm or cause material prejudice and thus would not have constituted reversible error. **Breedlove v. State**, 413 So.2d 1 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct.

184, 74 L.Ed.2d 149 (1982); *Spencer v. State*, 133 So.2d 729 (Fla. 1961), cert. denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). If raised on appeal, we would have found the statements to be within the limits of fair comments on the evidence and permissible solicitation by the state for a death recommendation.

[4, 5] We see no need or benefit in discussing in detail the remainder of Mann's claims in his 3.850 motion. We do reject his contention that it is appropriate in a collateral attack on his sentence of death to attempt to collaterally attack Mann's prior conviction of a crime of violence in Mississippi; neither is it error to fail to delay the execution of his sentence prior to a ruling in Mississippi on any collateral attack in that state.

It is obvious and clear that present counsel's complaint of trial counsel's

handling of the trial would not have affected the truth-seeking process, the evaluation of the evidence, the proper application of the law, or the outcome of the case. A comparison of the original trial record clearly and conclusively refutes any claim that there was any constitutional infirmity in the trial. The same is true of the appellate process. Although Mann urges vehemently numerous grounds for habeas corpus relief, each is either refuted or is insufficient for relief.

In conclusion, we are satisfied that this was a well and conscientiously tried case by counsel, the trial judge, and the jury. Appellate counsel and this Court have zealously fulfilled their review responsibilities. Accordingly, we affirm the order of the trial judge denying relief under the 3.850 motion. We deny the application for a stay of execution.

No motion for rehearing will be entertained by the Court.

It is so ordered.

ADKINS, Acting C.J., and OVERTON,
McDONALD, EHRLICH and SHAW J.J., concur.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-3182

LARRY EUGENE MANN,

Petitioner-Appellant,

versus

RICHARD L. DUGGER,
Secretary, Florida
Department of Correction,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(April 21, 1988)

Before RONEY, Chief Judge, TJOFLAT, HILL,
FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT,
ANDERSON, CLARK, and EDMONDSON, Circuit
Judges.

TJOFLAT, Circuit Judge:

I.

Petitioner, Larry Eugene Mann, is a Florida death row inmate. In 1981, petitioner was convicted of first degree murder and kidnapping.¹ At the conclusion of the sentencing phase of petitioner's trial, the jury recommended the death penalty. The trial judge followed the recommendation and entered a sentence of death.

On direct appeal, the Supreme Court of Florida affirmed the conviction but vacated the sentence and ordered a new sentencing proceeding without a jury.² Mann v. State, 420 So.2d 578 (Fla. 1982). The trial court reimposed the death penalty, and, on direct appeal from the resentencing, the supreme court affirmed. Mann v. State, 453 So.2d 784 (Fla. 1894), cert. denied, 469 U.S. 1181, 105 S.Ct. 940 (1985). Petitioner thereafter moved the trial court to vacate the judgment

and sentence pursuant to Fla. R. Crim. P. 3.850. He also petitioned the supreme court for writ of habeas corpus. The trial court denied the Rule 3.850 motion, and the supreme court affirmed, at the same time denying petitioner's request for habeas relief. Mann v. State, 482 So.2d 1360 (Fla. 1986).

Petitioner then instituted this habeas corpus action in the district court. In his petition, he attacked his conviction and sentence on several grounds. As one ground for attacking the sentence, petitioner contended that he was entitled to resentencing under Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985), because the prosecutor and trial judge had made comments that had likely diminished the sentencing jury's sense of responsibility with respect to its role in the sentencing process.³ The district court denied relief on all grounds. We reverse and hold that petitioner is entitled to relief on

the Caldwell claim.⁴ We accordingly order the district court to grant the writ setting aside petitioner's death sentence unless the state provides petitioner a new sentencing proceeding before a newly empaneled jury.

II.

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985), is best understood in the context of its facts. The case involved a challenged to a death sentence imposed pursuant to the Mississippi capital sentencing scheme. Mississippi affords capital defendants a bifurcated trial. After the jury renders a verdict of guilty, the trial court convenes a sentencing proceeding before the same jury. The jury then renders a verdict of either death or life imprisonment, and the trial court enters a sentence in accordance with the jury's verdict. If the jury renders a verdict of death, the sentence is automatically reviewed by the Supreme Court of

Mississippi. Miss. Code Ann. §99-19-105; Jackson v. State, 337 So.2d 1242, 1255 (Miss. 1976). In conducting its review, that court applies a presumption of correctness to the sentencing jury's verdict. Caldwell v. State, 443 So.2d 806, 816 (Miss. 1983) (Lee, J., dissenting). Under Mississippi law, the supreme court may overturn a death sentence in three situations only: (1) where the sentencing jury's verdict was so arbitrary as to be "against the overwhelming weight of the evidence," Williams v. State, 445 So.2d 798, 811 (Miss. 1984), cert. denied, 469 U.S. 1117, 105 S.Ct. 803 (1985); (2) where the evidence of statutory aggravating circumstances, required for the imposition of the death penalty, was so lacking that a "judge should have entered a judgment of acquittal notwithstanding the verdict," id.; or (3) where the sentence is "excessive or disproportionate to the penalty imposed in similar cases,

considering both the crime and the defendant." Id.

In Caldwell, the petitioner, Bobby Caldwell, contended that his death sentence was invalid under the eighth amendment because the sentencing jurors had been led to believe that the responsibility for determining the sentence rested not with them but with the appellate court that would later review the case. The facts supporting the claim were as follows. In closing argument before the sentencing jury, defense counsel entreated the jurors to show mercy and remarked that "[y]ou are the judges and you will have to decide [Caldwell's] fate. It is an awesome responsibility, I know -- an awesome responsibility." Caldwell, 472 U.S. at 324, 105 S.Ct. at 2637. The prosecutor then sought to downplay the effect of counsel's argument by telling the jurors that "your decision is not the final decision . . . [y]our job is

reviewable." Id. at 325, 105 S.Ct. at 2637. Defense counsel objected to this statement, but the trial court overruled the objection, commenting that "it [is] proper that the jury realizes that it is reviewable automatically as the death penalty commands." Id., 105 S.Ct. at 2638.

The United States Supreme Court held that Caldwell's sentence was invalid under the eighth amendment because it rested on "a determination made by a sentencer who ha[d] been led to believe that the responsibility for determining the appropriateness of the defendant's death rest[ed] elsewhere." Id. at 328 - 29, 105 S.Ct. at 2639. The Court reasoned that the eighth amendment's need for reliability in capital sentencing required that capital sentencers "view their task as a serious one of determining whether a specific human being should die at the hands of the State." Id. at 329, 105 S.Ct. at 2640. The

jurors, having been told that their decision was "automatically reviewable," were misled into believing that their judgment call on the evidence would be reviewed *de novo*. Thus, because the jury's sense of responsibility had likely been diminished as a result of the comments by the prosecutor and the court, the sentencing decision did not meet the standard of reliability required by the eighth amendment. *Id.* at 341, 105 S.Ct. at 2646.

In the present case, the attorney general argues that Caldwell is inapplicable because the Florida sentencing jury, unlike Mississippi sentencing jury, is not the actual sentencer under the state capital punishment scheme. Under the Florida statutory scheme, the jury weighs the evidence of aggravating and mitigating circumstances presented during the sentencing phase of the defendant's trial, and then makes a

recommendation of either life imprisonment or death. Fla. Stat. §921.141(2) (1985).⁵ That recommendation, the attorney general asserts, is always subject to rejection by the trial judge, who must under Fla. Stat. §921.141(3) independently weigh the aggravating and mitigating circumstances before entering a sentence. Because the trial judge plays this role in sentencing, the attorney general argues, Caldwell error does not occur when the jury is told that sentencing responsibility lies elsewhere.

At first blush, the attorney general's argument has some appeal. It is true that the trial court independently weighs the aggravating and mitigating circumstances and actually enters the sentence. It is also true that the statute describes the sentencing jury's function as that of "render[ing] an advisory opinion to the court." The legislature's use of the term "advisory,"

considered in a vacuum, could be viewed as evincing a legislative intent that the sentencing jury play a role which, in the final analysis, is in fact largely meaningless. In common parlance, we often associate the term "advisory" with the term "nonbinding"; "advice," in the minds of most people, is something that a decisionmaker may follow or reject as he or she sees fit. In analyzing the role of the jury, however, we cannot operate in the vacuum. Rather, we must look to how the Supreme Court of Florida, the final interpreter of the death penalty statute, has characterized that role.

A.

A review of the case law shows that the Supreme Court of Florida has interpreted section 921.141 as evincing a legislative intent that the sentencing jury play a significant role in the Florida capital sentencing scheme. See Messer v. State, 330 So.2d 137,

142 (Fla. 1976) ("[T]he legislative intent that can be gleaned from Section 921.141 [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part."); see also Riley v. Wainwright, 517 So.2d 656, 657 (Fla. 1987) ("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process."); Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974) (right to sentencing jury is "an essential right of the defendant under our death penalty legislation"). In the supreme court's view, the legislature created a role in the capital sentencing process for a jury because the jury is "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976),

cert. denied, 431 U.S. 925, 97 S.Ct. 2200 (1977); see also McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982) (the jury's recommendation "represent[s] the judgment of the community as to whether the death sentence is appropriate"); Chambers v. State, 339 So.2d 204, 209 (Fla. 1976) (England J., concurring) (the sentencing jury "has been assigned by history and statute the responsibility to discern truth and mete out justice").

To give effect to the legislature's intent that the sentencing jury play a significant role, the Supreme Court of Florida has severely limited the trial judge's authority to override a jury recommendation of life imprisonment. In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), the court held that a trial judge can override a life recommendation only when "the facts [are] so clear and convincing that virtually no reasonable

person could differ." That the court meant what it said in Tedder is amply demonstrated by the dozens of cases in which it has applied the Tedder standard to reverse a trial judge's attempt to override a jury recommendation of life. See, e.g., Wasko v. State, 505 So.2d 1314, 1318 (Fla. 1987); Brookings v. State, 495 So.2d 135, 142 - 43 (Fla. 1986); McCormick v. State, 421 So.2d 1072, 1075 - 76 (Fla. 1982); Goodwin v. State, 405 So.2d 170, 172 (Fla. 1981); Odom v. State, 403 So.2d 936, 942 - 43 (Fla. 1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1970 (1982); Neary v. State, 384 So.2d 881, 885 - 88 (Fla. 1980); Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979); Shue v. State, 366 So.2d 387, 390 - 91 (Fla. 1978); McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977); Thompson v. State, 328 So.2d 1, 5 (Fla. 1976).

The attorney general argues that although the trial court may be required under Tedder to give deference to a jury recommendation of life, it is in no way similarly bound to give deference to a jury recommendation of death. Since a Florida sentencing jury can therefore never play a substantive role in imposing a death sentence, the attorney general contends, Caldwell can never be implicated in a Florida case.

One problem with this argument is that its central premise -- that the sentencing jury plays no substantive role in imposing a death sentence -- is contradicted by numerous pronouncements by the Supreme Court of Florida. The issue of what deference is due a jury recommendation of death would arise most directly when the jury recommends death and the trial judge rejects the recommendation and imposes life imprisonment. Such cases never appear before the supreme court,

however, because the state cannot appeal a sentence of life imprisonment. See State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950 (1974). Nonetheless, the issue has arisen in cases where the jury recommends death, the trial court imposes death, and the defendant contends on direct appeal that the trial court improperly weighed the aggravating and mitigating circumstances. In one such recent case, Smith v. State, 515 So.2d 182 (Fla. 1987), the supreme court held that "[a]lthough we find that one of the five aggravating circumstances relied on by the trial court was invalid, we approve the death sentence on the basis that a jury recommendation of death is entitled to great weight and there were no mitigating circumstances to counterbalance the four valid aggravating circumstances." Id. at 185 (emphasis added). In LeDuc v. State, 365 So.2d 149 (Fla.

1978), cert. denied, 444 U.S. 885, 100 S.Ct. 175 (1979), the supreme court stated that "[t]he primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all reasonable data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation." *Id.* at 151 (citing Tedder) (emphasis added). See also Middleton v. State, 426 So.2d 548, 552 - 53 (approving trial court's imposition of death sentence and reiterating in conclusion that jury had recommended death), cert. denied, 458 U.S. 1122, 102 S.Ct. 3511 (1982); Francois v. State, 407 So.2d 885, 891 (Fla. 1982) (same), cert. denied, 463 U.S. 1230, 103 S.Ct. 3573 (Fla. 1983); Enmund v. State, 399 So.2d 1362, 1373 (Fla. 1981) (same), rev'd on other grounds, 458 U.S. 782, 102 S.Ct. 3368 (1982); cf. Grossman v. State, 13 Fla. L. Weekly 127,

133 n.1 (Fla. Feb. 18, 1988) ("We have . . . held that a jury recommendation of death should be given great weight."). On one occasion, the supreme court went so far as to suggest that the trial judge's role in sentencing is merely to articulate findings in support of the jury's sentencing decision. See Provenzano v. State, 497 So.2d 1177, 1185 (Fla. 1986) ("[T]he trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating factors."), cert. denied, ____ U.S. ___, 107 S.Ct. 1912 (1987).

The issue of what deference is due a jury recommendation of death has also arisen in cases where the jury recommends death, the trial judge imposes death, and the defendant claims on direct appeal that the trial judge gave undue deference to the jury's recommendation. The Supreme Court of Florida has

consistently indicated in such cases that no error occurs when the trial judge gives due weight to the jury recommendation of death. In Garcia v. State, 492 So.2d 360 (Fla.), cert. denied, ___ U.S. ___, 107 S.Ct. 680 (1986), for instance, the judge stated in his instructions to the jury that their recommendation "would not be overruled unless there was no reasonable basis for it." Id. at 367. The jury returned a recommendation of death and the trial court entered a sentence of death. On direct appeal, the defendant claims, citing the trial court's instructions to the jury, that the judge had mistakenly given weight to the jury's recommendation of death. The supreme court disagreed and affirmed the death sentence: "There is no error; this is the law. It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it

weight." Id. (emphasis added). See also Rogers v. State, 511 So.2d 526, 536 (Fla. 1987) (no merit to appellant's contention that trial court gave undue weight to jury's recommendation of death where record reflects that "the court has weighed relevant factors and reached its own independent judgment about the reasonableness of the jury's recommendation."), cert. denied, ___ U.S. ___, 108 S.Ct. 733.⁶

The supreme court's understanding of the jury's sentencing role is illustrated by the way it treats sentencing error. In cases where the trial court follows a jury recommendation of death, the supreme court will vacate the sentence and order resentencing before a new jury⁷ if it concludes that the proceedings before the original jury were tainted by error. Thus, the supreme court has vacated death sentences where the jury was presented with improper evidence, see

Dougan v. State, 470 So.2d 697, 701 (Fla. 1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1499 (1986), or was subject to improper argument by the prosecutor, see Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430 (1984). The supreme court has also vacated death sentences where the trial court gave the jury erroneous instructions on mitigating circumstances or improperly limited the defendant in his presentation of evidence of mitigating circumstances. See Thompson v. Dugger, 515 So.2d 173, 175 (Fla. 1987); Downs v. Dugger, 514 So.2d 1069, 1072 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656, 659 - 60 (Fla. 1987); Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987); Floyd v. State, 497 So.2d 1211, 1215 - 16 (Fla. 1986); Lucas v. State, 490 So.2d 943, 946 (Fla. 1986); Simmons v. State, 419 So.2d 316, 320 (Fla. 1982); Miller v. State, 332 So.2d 65, 68 (Fla. 1976). In

these cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation. See, e.g., Riley, 517 So.2d at 659 ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure."); Valle, 502 So.2d at 1226 ("[U]nless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation or resentencing."). Dougan, 470 So.2d at 701 (death sentence vacated and resentencing ordered where supreme court could not "tell how the improper evidence and argument may have affected the jury"); Teffeteller, 439 So.2d at 845 (death sentence vacated and resentencing ordered where supreme court could not "determine that the needless and inflammatory

comments by the prosecutor did not substantially contribute to the jury's advisory recommendation of death"). Such a focus would be illogical unless the supreme court began with the premise that the jury's recommendation must be given significant weight by the trial judge. Once that premise is established, a focus on how the error may have affected the jury's recommendation makes sense: if the jury's recommendation is tainted, then the trial court's sentencing decision, which took into account that recommendation, is also tainted.

Finally, we note that the Supreme Court of Florida has ordered resentencing in cases where the trial court excused a prospective juror in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). See, e.g., Chandler v. State, 442 So.2d 171, 173 - 75 (Fla. 1983). Under Witherspoon and its progeny, a state violates a capital

defendant's right to trial by impartial jury when it excuses for cause a prospective juror who has voiced conscientious objections to the death penalty, unless the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 433, 105 S.Ct. 844, 857 (1985). Witherspoon assumes, of course, that the jury will play a substantive role in the sentencing decision. By applying Witherspoon to vacate death sentences, then, the Supreme Court of Florida implicitly acknowledges that the jury plays a substantive role under the Florida capital sentencing scheme.

Thus, in various ways, the Florida case law evinces an interpretation of the death penalty statute that requires a trial judge to give great weight to a jury's sentencing recommendation. As our review of the case

law shows, that requirement applies as to both recommendations of life imprisonment and recommendations of death.

B.

In analyzing the role of the sentencing jury, the Supreme Court of Florida has apparently been influenced by a normative judgment that a jury recommendation of death carries great force in the mind of the trial judge. This judgment is most clearly reflected in cases where an error has occurred before the jury, but the trial judge indicates that his own sentencing decision is unaffected by the error. As a general matter, reviewing courts presume that trial judges exposed to error are capable of putting aside the error in reaching a given decision. The Supreme Court of Florida, however, has on occasion declined to apply this presumption in challenges to death sentences. For example, in Messer v. State, 330 So.2d 137 (1976), the trial court

erroneously prevented the defendant from putting before the sentencing jury certain psychiatric reports as mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. The supreme court vacated the sentence, even though the sentencing judge had stated that he had himself considered the reports before entering sentence. The supreme court took a similar approach in Riley v. Wainwright, 517 So.2d 656 (Fla. 1987). There, the defendant presented at his sentencing hearing certain nonstatutory mitigating evidence. The trial court instructed the jury that it could consider statutory mitigating evidence, but said nothing about the jury's obligation under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), to consider nonstatutory mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. In imposing the death sentence, the trial judge

expressly stated that he had considered all evidence and testimony presented.⁸ On petition for writ of habeas corpus, the supreme court ordered the defendant resentenced. The court held that the jury had been precluded from considering nonstatutory mitigating evidence, and that the trial judge's consideration of that evidence had been "insufficient to cure the original infirm recommendation." Id. at 659 n. 1.

In light of the disposition of these cases, it would seem that the Supreme Court of Florida has recognized that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error. We do not find it surprising that the supreme court would make this kind of normative judgment. A jury recommendation of death is, after all, the final stage in an

elaborate process whereby the community expresses its judgment regarding the appropriateness of a death sentence. The process begins with the legislature, which broadly defines the class of cases for which capital punishment is appropriate. Then, in the particular case, the prosecutor, who is electorally accountable to the community, makes the decision whether to request the death penalty. Finally, the jury, traditionally depicted as the conscience of the community, makes a judgment about the appropriateness of death in light of aggravating and mitigating circumstances. Thus, by the time the case comes before the judge for the actual imposition of sentence, it has already been filtered through three levels of community sentiment, each level less porous than the preceding one.⁹ It would indeed be surprising were the trial judge, who in Florida is also an electorally accountable official, not

powerfully affected by the result of that process.

C.

In light of the case law, we conclude that the Florida jury plays an important role in the Florida capital sentencing scheme. The case law reflects an interpretation of the death penalty statute that requires the trial court to give significant weight to the jury's recommendation, whether it be a recommendation of life imprisonment or a recommendation of death. The case law also reflects, we think, an insightful normative judgment that a jury recommendation of death has an inherently powerful impact on the trial judge.

Because the jury's recommendation is significant in these ways, the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant.¹⁰

Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that had been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing. See Adams v. Wainwright, 804 F.2d 1526, 1532 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, 56 U.S.L.W. 3608 (U.S. Mar. 7, 1988).

III.

Having determined that the sentencing jury plays a substantive role under the Florida capital sentencing scheme, we turn to the question whether the jury in this case was misled as to its role so as to render petitioner's sentence invalid under the

eighth amendment. We begin with a thorough examination of the trial record.

A.

The first reference to the jury's role was made as the jury was being selected, during counsel's voir dire of the venire. The prosecutor said the following:

The recommendation that you make to Judge Federico in [the sentencing] portion of the trial is simply a recommendation, and he is not bound by it. He may impose whatever sentence the law permits. He will have been here and will have listened to all the testimony himself.

A few moments later, the prosecutor repeated this point in stronger terms:

You understand you do not impose the death penalty; that is not on your shoulders Again, that decision rests up here with the law, with Judge Federico. You will have the opportunity after you have heard everything there is to hear to make a recommendation to him. But it is not legally on your shoulders, though. It is not your ultimate decision. You act in that regard in an advisory capacity only.

The prosecutor repeated the point again that afternoon, in a dialogue with two veniremen:

You . . . understand that the ultimate responsibility rests with the Court; that it's not the jury's responsibility?

During closing argument at the conclusion of the guilt phase of the trial, the prosecutor once again informed the jury that "[t]he matter of sentencing ultimately rests with Court."

After the jury rendered its verdict of guilty, the jurors were temporarily excused from the courtroom while the court and counsel made preliminary preparations for the sentencing phase of the trial. At that time, defense counsel requested that the jury, when it returned, be instructed by the court that its sentencing recommendation would be "entitled to great weight." The court refused to grant the request:

THE COURT: Well, I think that goes without saying. I don't know if I need to instruct them that that is so.

[DEFENSE COUNSEL]: I think it is. The reason we would ask --

THE COURT: That's something that I need to do after they make their recommendation, and I will give it great weight.

[DEFENSE COUNSEL]: I know, but they need to know that so they know we're not up there just --

THE COURT: I think the standard instructions bring home to them that it is very important that they, you know, [d]o not act hastily or without due regard to the gravity of these proceedings, that they should carefully weigh and sift and consider the evidence. I think that's sufficient.

Notwithstanding his apparent understanding of the sentencing jury's function, the judge informed the jurors when they returned to the courtroom that "[t]he final decision as to

what punishment shall be imposed rests solely with the judge of this court." The prosecutor repeated the point in the final statement of his closing argument at the conclusion of the sentencing phase:

What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico. That is his sworn position in the system. He's heard everything you have heard. He may have the opportunity to learn more before he imposes a sentence. I think this community, as represented by this jury, should give to him the prerogative of imposing the death penalty, if that's what he ultimately feels is required in this case.

The court then read its instructions to the jury. The instructions included the following statements regarding the jury's sentencing function:

Ladies and gentlemen of the jury, it is now your duty to advise the Court

as to what punishment should be imposed on the Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory opinion based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

The court's instructions also included the following statements.

The fact that the determination of whether or not a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you

ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment upon the sole issue which is submitted to you at this time, of whether a majority of your number recommend that the Defendant be sentenced to death or life imprisonment.

After the court finished the instructions, it ordered the jury to retire and make a decision. When the jury returned, it announced a recommendation of death. The jury was polled and then dismissed. After the bailiff had declared that "[t]he jury has left the courtroom," the judge remarked, for the record, that "[t]he court, as required by law, will give great weight to the recommendation of the jury."

B.

In reviewing Caldwell claims, our task is twofold. First we must determine whether the prosecutor's comments to the jury were

such that they would "minimize the jury's sense of responsibility for determining the appropriateness of death." Caldwell, 472 U.S. at 341, 105 S.Ct. at 2646. Second, if the comments would have such effect, we must determine "whether the trial judge in this case sufficiently corrected the impression left by the prosecutor." McCorquodale v. Kemp, 829 F.2d 1035, 1037 (11th Cir. 1987).

When a trial court does not correct misleading comments as to the jury's sentencing role, the state has violated the defendant's eighth amendment right because the court has given the state's imprimatur to those comments; the effect is the same as if the trial court had actually instructed the jury that the prosecutor's comments represented a correct statement of the law. See Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir. 1986) (en banc), cert. denied, ____ U.S. ___, 107 S.Ct. 1359 (1987). When a trial court does

make some attempt to correct the prosecutor's misleading comments, the question becomes whether the corrective statement would, in the mind of a reasonable juror who had been exposed to the misleading comments, correct the misapprehension that the comments would induce. Because our focus is ultimately on the trial court's actions,¹¹ our mode of review is similar to that used to review claims based on erroneous jury instructions. Cf. Lamb v. Jernigan, 683 F.2d 1332, 1339 - 40 (11th Cir. 1982) (court must consider effect of erroneous instruction on reasonable juror "in light of the remainder of the charge and the entire trial"), cert. denied, 460 U.S. 1024, 103 S.Ct. 1276 (1983).

In this case, the comments by the prosecutor were such that they would mislead or at least confuse the jury as to the nature of its sentencing responsibility under Florida law. It bears emphasizing that the

prosecutor in Caldwell stated only that the jury's verdict would be "automatically reviewable." Technically, this statement was an accurate statement of Mississippi law -- death sentences are automatically reviewed by the Supreme Court of Mississippi under Miss. Code Ann. §99-19-105. The mischief was that the statement, unexplained, would have likely been misunderstood by the jurors as meaning that their judgment call on the appropriateness of a death sentence did not really matter. We are faced with a similar situation here. The prosecutor repeatedly told that jury that its task was to render an "advisory" recommendation. As with "automatically reviewable" in Caldwell, this characterization is technically accurate, at least in the sense that the Florida death penalty statute contains the term "advisory." However, the danger exists that the jurors, because they were unaware of the body of law that requires

the trial judge to give weight to the jury recommendation, were misinformed as to the importance of their judgment call. The danger is particularly strong here, because nothing in the common meaning of the term "advisory" would suggest to the layman that the trial judge would in any way be bound by the recommendation; indeed, the common meaning of the term would suggest precisely the contrary.

Moreover, here the prosecutor stated to the jurors twice that the burden of imposing the death penalty was "not on your shoulders."¹² He repeatedly told the jurors that the responsibility for imposing the sentence rested with the trial judge. Additionally, we note that the prosecutor suggested to the jurors that the trial judge, because of his position as a legal authority, was more able than the jury to make the appropriate sentencing decision. As the Supreme Court noted in

Caldwell, this kind of suggestion induces jurors, who are "placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice," to delegate wrongly their sentencing responsibility. Caldwell, 472 U.S. at 333, 105 S.Ct. at 2641 - 42. We conclude that the prosecutor's statements, considered together, misrepresent the nature of the jury's critical role under the Florida capital sentencing scheme.¹³ Such comments, if uncorrected, would undoubtedly minimize a juror's sense of responsibility, thus creating "a danger of bias in favor of the death penalty." Adams, 804 F.2d at 1532.

Turning to the second prong of our inquiry, we conclude that the trial judge's comments did not correct the false impression left by the prosecutor. The trial court specifically denied defense counsel's request that the jury be properly informed as to its

role. Moreover, the judge himself stated that the final sentencing decision rested "solely with the judge of this court." The trial judge expressly put the court's imprimatur on the prosecutor's previous misleading statements by saying to the jurors that "[a]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge."¹⁴

The only potentially corrective statement by the court came when the court instructed the jurors that they should proceed with "due regard to the gravity" of the matter and should "carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment." This statement, we conclude, did not cure the harm posed by the court's other actions. The statement would do little if anything to change a juror's misapprehension about the effect of

the jury's decision; it only instructs the jurors that they should approach their task with care and deliberation. At best, it likely left some jurors confused as to their proper role. We therefore conclude that the court's actions, as considered by a reasonable juror who had been exposed to the prosecutor's misleading comments did not correct the false impression created by those comments. Cf. Caldwell, 472 U.S. at 340 n.7, 105 S.Ct. at 2645 n. 7 (prosecutor's later statements did not retract or undermine the misimpression created by the earlier statements). Because the overall effect of the court's actions was to diminish the jury's sense of responsibility with regard to its sentencing role, petitioner's sentence is invalid under the eighth amendment.

IV.

In conclusion, we reverse the district court's denial of the writ of habeas corpus with regard to petitioner's Caldwell claim.

We remand the case to the district court with instructions to issue the writ setting aside petitioner's death sentence unless the State affords petitioner a new sentencing proceeding before a newly empaneled jury.

REVERSED AND REMANDED.

1. Petitioner's criminal conduct is described in Mann v. State, 420 So.2d 578 (1982).

2. The operation of the Florida capital sentencing scheme is explained in part II. See supra note 5 and accompanying text. Here, on petitioner's direct appeal, the Supreme Court of Florida held that the trial judge had improperly found two aggravating circumstances under Fla. Stat. §921.147(5) and had failed to specify with sufficient clarity his conclusions regarding mitigating factors, as required by Fla. Stat. §921.141 (6). Mann v. State, 420 So.2d 578, 581 (Fla. 1982). Accordingly, the supreme court ordered resentencing by the trial judge. Because the errors identified by the supreme court pertained only to the trial judge's findings, and not to defects before the sentencing jury, resentencing before a new jury was not deemed necessary.

3. Petitioner has already had one resentencing, pursuant to an order by the Supreme Court of Florida. See supra note 2 and accompanying text. That resentencing was accomplished without empaneling a new jury;

in resentencing petitioner, therefore, the trial court used the recommendation of the original sentencing jury. That being the case, we must examine the original jury sentencing proceeding in determining whether petitioner's sentence is valid under the eighth amendment.

4. We affirm the district court's disposition of the remaining claims. Those claims are described in the panel opinion. See Mann v. Dugger, 817 F.2d 1471 (11th Cir.), vacated, 828 F.2d 1498 (11th Cir. 1987).

The attorney general argues that petitioner's Caldwell claim is barred by procedural default because petitioner failed to raise the claim on direct appeal of his conviction and sentence. We find that the claim is not procedurally barred. Although petitioner failed to raise the claim on direct appeal, he did raise it in his Rule 3.850 motion. The circuit court denied that motion and petitioner appealed to the Supreme Court of Florida. In disposing of the appeal, the supreme court stated that its review of the record "clearly and conclusively refute[d] any claim that there was any constitutional

infirmity in the trial." Mann v. State, 482 So.2d 1360, 1362 (Fla. 1986) (emphasis added). We interpret this statement as indicating that the supreme court considered the merits of each claim in petitioner's Rule 3.850 motion, including the Caldwell claim. Since the Supreme Court of Florida therefore chose not to enforce its own procedural default rule, federal habeas review of the claim is not barred. See Oliver v. Wainwright, 795 F.2d 1524, 1528 - 29 (11th Cir. 1986), cert. denied, ____ U.S. ___, 107 S.Ct. 1380 (1987); Campbell v. Wainwright, 738 F.2d 1573, 1576 - 77 (11th Cir. 1984), cert. denied, 475 U.S. 1126, 106 S.Ct. 1652 (1986); Rogers v. McMullen, 673 F.2d 1185, 1188 (11th Cir. 1982), cert. denied, 459 U.S. 1110, 103 S.Ct. 740 (1983).

5. Section 921.141 provides:

(1) Separate proceedings on issue of penalty. -- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the

defendant should be sentenced to death or life imprisonment The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6)

(2) Advisory sentence by the jury. -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exits; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.
-- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) that sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

.

(4) Review of judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida

(5) Aggravating circumstances -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest

or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), and Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987), the capital sentencer may not be precluded from considering nonstatutory mitigating evidence.

6. Ross v. State, 386 So.2d 1191 (Fla. 1980), is not inconsistent with the proposition that the trial judge must give great

weight to a jury recommendation of death. In Ross, the jury recommended death and the trial judge imposed a death sentence, indicating in his findings that he was bound by the jury's recommendation. Id. at 1197. The Supreme Court of Florida ordered resentencing, stating that although a jury recommendation of death "should be given great weight and serious consideration," id., this trial judge had given the recommendation "undue weight," id. at 1193, by abdicating his statutory duty to make an "independent judgment" about the aggravating and mitigating circumstances. Id. at 1198.

7. The Supreme Court of Florida has permitted resentencing without a jury where the error in the original proceeding related to the trial court's findings and did not affect the jury's recommendation. See, e.g., Menendez v. State, 419 So.2d 312, 314 (Fla. 1982); Mikenas v. State, 407 So.2d 892, 893 (Fla. 1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307 (1982); Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384 (1981); Fleming v. State, 374 So.2d 954, 959 (Fla. 1979). Such were the circumstances in this very case. See supra note 2.

8. The trial judge made this statement on a resentencing. On Riley's direct appeal of his original sentence, the supreme court ordered resentencing on the ground that the trial judge had considered nonstatutory aggravating factors, in violation of state law. Riley v. State, 366 So.2d 19 (Fla. 1978). The resentencing was accomplished without empaneling a new jury. At the resentencing, the trial judge permitted Riley to introduce additional mitigating evidence. The resentencing was affirmed on direct appeal. Riley v. State, 413 So.2d 1173 (Fla.), cert. denied, 459 U.S. 981, 103 S.Ct. 317 (1982).

9. It is at least partly because of these dynamics, we may surmise, that the Supreme Court of Florida has interpreted the legislative intent underlying the death penalty statute as requiring the trial judge to give great weight to the jury's recommendation.

10. Florida could, if it so desired, administer a capital sentencing scheme in which the jury played no role. See Spaziano v. Florida, 468 U.S. 447, 465, 104 S.Ct. 3154, 3165 (1984) ("[T]here is no

constitutional imperative that a jury have the responsibility of deciding whether the death sentence should be imposed"). The fact of the matter is, however, that under the existing scheme in Florida the jury does share in capital sentencing responsibility. Because the jury's recommendation is a critical factor in the ultimate sentencing decision, the jury's function, like the function of any capital sentencer, must be evaluated pursuant to eighth amendment standards. This court, in various contexts in federal habeas cases, has treated the Florida jury as if it were a sentencer for constitutional purposes. For example, in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), we held that the eighth amendment is violated when a Florida sentencing jury is instructed that, once it finds the victim's murder to have been committed under aggravating circumstances, death is presumed to be the appropriate sentence.

To date, the Supreme Court of Florida has refused to grant relief on Caldwell claims. See Combs v. State, 13 Fla. L. Weekly 142, 143 - 44 (Fla. Feb. 18, 1988); Grossman v. State, 13 Fla. L. Weekly 127, 129 - 30 (Fla. Feb. 18, 1988); Foster v. State,

518 So.2d 901, 901 - 02 (Fla. 1987); Smith v. State, 515 So.2d 182, 185 (Fla. 1987); Aldridge v. State, 503 F.2d 1257, 1259 (Fla. 1987); Pope v. Wainwright, 496 So.2d 798, 804 - 05 (Fla. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1617 (1987). We do not read these cases as necessarily holding that a Caldwell violation could never occur in a Florida case. See Smith, 515 So.2d at 185 (no Caldwell violation provided "the jury instruction properly stress the importance of the jury role"); Pope, 496 So.2d at 805 (no Caldwell violation "as long as the significance of [the jury's] recommendation is adequately stressed"). In any event, we are not bound by a state court's application of federal constitutional principles. We look to that court's pronouncements only to determine the nature of the sentencing process; we independently decide how the federal Constitution applies to claims pertaining to that process as thus defined.

11. As we noted in McCorquodale, the Supreme Court did not say in Caldwell that any misleading comment by the prosecutor would constitute ground for reversal; "rather it stated that '[s]uch comments, if left uncorrected, might so affect the fundamental

fairness of the sentencing proceeding as to violate the Eighth Amendment.'" McCorquodale, 829 F.2d at 1037 (quoting Caldwell, 472 U.S. at 340, 105 S.Ct. at 2645). Thus, the proper focus is on whether the trial court's actions were sufficient to correct the misimpression created by the prosecutor's comments. See also Caldwell, 472 U.S. at 333, 105 S.Ct. at 2641 - 42 ("[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger") (emphasis added); Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir. 1986) (en banc) ("Of critical importance in Caldwell was the fact the trial judge approved of the prosecutor's comments), cert. denied, ___ U.S. ___, 107 S.Ct. 1359 (1987).

12. As we have noted, a number of the misleading comments were made before the jury was selected, during voir dire. At first blush, one might think that such comments at that stage of the trial proceeding would benefit the defendant. One might think that a prospective juror who holds strong personal reservations about the death penalty would, upon hearing that he will not be responsible for the sentencing decision, be less inclined

to express those reservations in open court. The ultimate result might be that the prosecutor would be disabled from excusing for cause some prospective jurors who would otherwise be properly excusable under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968). Thus, one might think, the misleading comments could ultimately have a beneficial effect from the defendant's point of view.

Even if there were the potential for some marginal benefit, the dangers outlined in Caldwell would remain. The statements that were made during the voir dire were not isolated; they were not directed solely at those prospective jurors who had expressed reservations about the death penalty. Rather, they were made before the prospective jurors collectively, at a time when the prosecutor was purportedly outlining the role of the jury. This court has recognized in the past that comments made prior to the sentencing phase can establish a Caldwell violation. See Adams v. Wainwright, 804 F.2d 1526, 1531 n. 7 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, 56 U.S.L.W. 3608 (U.S. Mar. 7, 1988)

13. See part II, supra.

14. The only statement suggesting to the jurors that their role was important was a single isolated statement made by defense counsel during jury selection. In light of the prosecutor's repeated suggestions throughout the proceedings that the jury's role was unimportant, we are satisfied that when the jurors heard the trial judge say "as you have been told," they understood the reference to be the prosecutor's portrayal of their role.

CLARK, Circuit Judge, specially concurring:

I concur with Judge Tjoflat's opinion in the Mann case which finds that there was a Caldwell violation. I also concur with Judge Tjoflat's specially concurring opinion in Harich which concludes that there is no Caldwell violation. I was on the panel in both cases and wrote something with respect to the Caldwell issue in each case. See Mann v. Dugger, 817 F.2d 1471, 1789, and Harich v. Dugger, 813 F.2d 1089, 1098. I have read the record in both of the cases and agree with Judge Tjoflat and the others concurring with him that there is a meaningful difference.

In a Caldwell-type case, it is essential that one determine the jury's perception of its role during the sentencing phase of the trial. That is, was the jurors' collective sense of responsibility lessened when asked to decide whether life or death was the appropriate penalty. The answer depends on

an analysis of the particular facts and circumstances of each case. The trial court may explain to the jury its advisory role, "as long as the significance of [the jury's] recommendation is adequately stressed." Harich v. Wainwright, 813 F.2d 1082, 1101 (11th Cir. 1987) (quoting Pope v. Wainwright, 496 So.2d 798 (Fla. 1986)).

In Mann, the prosecutor made the following statements during the voir dire examination:

The recommendation that you make to Judge Federico in this portion of the trial is simply a recommendation, and he is not bound by it. He may impose whatever sentence the law permits. He will have been here and will have listened to all of the testimony himself.

* * *

[Y]ou understand you do not impose the death penalty. That is not on your shoulders. The ultimate decision rests with Judge Federico.

* * *

Again, that decision rests up here with the law, with Judge Federico. You will have the opportunity after you have heard everything there is to hear to make a recommendation to him. But it is not legally on your shoulders, though. It is not your ultimate decision. You act in that regard in an advisory capacity only.

817 F.2d at 1489 (emphasis added)

Following are the judge's comments at the beginning of the sentencing proceeding:

The punishment for this crime is either death or life imprisonment. The final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the jury render to the court an **advisory sentence** as to what sentence should be imposed on the defendant.

Id. (emphasis added). It is clear from the above that the prosecutor and the court misled the jury as to its responsibility. The

last thought left with the jury by the prosecutor in his closing argument at sentencing replayed his earlier statements:

What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico. That is his sworn position in the system. He's heard everything you have heard. He may have the opportunity to learn more before he imposes a sentence.

Transcript at 2439. The foregoing flagrant misstatements by the prosecutor was followed soon thereafter by Judge Federico's instructions to the jury, which included the following:

Ladies and Gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed on the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is

your duty to follow the law which will now be given to you by the court and render to the court an **advisory opinion** based upon your determination

817 F.2d at 1490 (emphasis added). Clearly the jurors' perception of their role was minimized by the prosecutor's statement and then the trial court's endorsement when the court said "as you have been told" The defense attorneys did not address the role of the jury in their closing arguments, making clear that the judge's reference was to the prosecutor's misdescription of the jurors' role.

The circumstances of this case indicate there was an intolerable danger that the jury recommended the death penalty because it did not understand that its recommendation would, to some extent, bind the trial court to a particular result. The jurors heard compelling mitigating evidence that Mann suffered

from psychotic depression, and that he committed this crime during a fit of pedophilic rage. They were told that Mann attempted to commit suicide by slashing his forearms shortly after the crime had been committed. He had attempted suicide several times in the past. When the police came to his aid on the day of the murder, Mann said he had done something stupid and needed help. At the sentencing hearing, a psychiatrist testified that Mann committed the crime while under the influence of an extreme mental or emotional disturbance. The victim, a 10 year-old girl, intensified his feelings of guilt regarding his pedophilic instincts, thus channeling his self-destructive rage into an act of violence. Faced with a difficult decision, the jurors were quite susceptible to a suggestion that the sentencing decision was "not on [their] shoulders." The improper comments in this case created the "intolerable danger"

that the advisory jury gave its recommendation without truly understanding its proper role.

With respect to the identical issue in the Harich case, the prosecutorial and judicial comments in this case did not minimize the role of the jury. The statements went no further than explaining to the jury the respective functions of the judge and jury. The jury was told to listen to the evidence, weigh the aggravating and mitigating circumstances and render an advisory opinion as to the applicability of the death penalty in this case. Nothing was said which would imply to the jury that its recommendation was superfluous or that the importance of the jury's decision was lessened by the fact that it was only a recommendation. Upon examination of the record, one concludes that the seriousness of the jury's advisory role was adequately communicated by the court and

prosecutor. As mentioned in the discussion of the Mann case, the Florida Supreme Court has stated that comments which accurately explain the respective functions of the judge and jury are permissible under Caldwell "as long as the significance of the [jury's] recommendation is adequately stressed." Pope v. Wainwright, 496 So.2d 798 (Fla. 1986).

In distinguishing between Mann and Harich, it is necessary to analyze the context in which the statements are made with respect to the jury's sense of responsibility for its sentencing decision. In Mann there were a number of statements by the prosecutor which reduced the jurors' perception of their duty vis-a-vis the judge's duty, and the court's comments in Mann gave emphasis to what the prosecutor had said. However, in Harich, there is very little to which one can point that was said by the prosecutor that would have misled the jury. Judge Vance in

his dissent at page 4 recites one statement by the prosecutor. The balance of the statements in that dissent are quotations from what the trial judge told the jury and those statements read in the context of the total instructions and comments of both counsel do not reduce the importance of the jury's role during the sentencing phase. At page 4 of his special concurrence, Judge Tjoflat points out statements by the trial judge and defense counsel which emphasize the importance of the juror's responsibility. Similar statements are not found in the Mann trial.

Thus, I have no trouble in joining the majority in Mann that the writ be issued unless a new trial is granted, and also concurring with the majority in Harich that the petition be denied.

FAY, Circuit Judge, dissenting, in which RONEY, Chief Judge, HILL and EDMONDSON, Circuit Judges, join:

Most respectfully, I dissent from the conclusion reached in the majority opinion that there is merit in the Caldwell claim presented by the petitioner. Our court is issuing opinions in Harich v. Dugger and in this case which contain lengthy discussions of Caldwell claims and how they are to be evaluated. I join in the statement of Judge Tjoflat in his special concurrence in Harich that: "The relevant question under Caldwell is whether remarks made at trial lessened the jury's sense of responsibility toward its role of determining whether the death penalty is appropriate." From our perspective as members of the Court of Appeals, this necessarily involves a case by case approach with detailed review of the entire record of any given case. The bottom line, however, is the subjective reaction of each individual judge

to the language and text of the record. In this case, it is my opinion that no Caldwell violation occurred. Phrased in the words of the "relevant question," this record convinces me that none of the remarks of the judge, prosecutor or defense counsel lessened, in any way, the jury's sense of responsibility toward its role in deciding whether or not death was the appropriate penalty.

The majority finds that at trial, the prosecutor misled the jury as to its sentencing role by stating that (1) its sentence recommendation was advisory, and (2) the ultimate responsibility for imposition of the sentence rests with the judge. The majority also concluded that the trial judge did not correct the false impression left by the prosecutor. See ante section III. In my opinion, the record does not support these findings.

I agree with the majority's analysis of the role of the trial judge in determining whether a Caldwell violation occurred. See ante at ___ (citing *McCorquodale v. Kemp*, 829 F.2d 1035, 1037 (11th Cir. 1987)). The trial judge should take steps to correct the impression made when a prosecutor's inaccurate statements diminish a jury's sense of responsibility in a capital sentencing case. In such a case, a trial judge's curative response could negate a potential Caldwell violation. However, in this case, there was no need for such a correction since no misimpression had been given.

In Florida, comments made by the prosecutor which emphasize the "advisory" role of the jury or indicate that the jury is making a "recommendation" to the judge, do not support a Caldwell claim. See *Harich v. Wainwright*, No. 86-3167, slip op. at ___ (11th Cir. ___, 1988) (en banc); *Combs v. State*, 13

Fla. L. Weekly 142 (Fla. Feb. 26, 1988).

Under Florida's death penalty statute the jury's role is advisory. After receiving the jury's recommendation, the trial judge must independently weigh the aggravating and mitigating circumstances and render sentence.¹

It serves no purpose to dwell on the word 'advisory' [or 'recommendation'] as does the majority, because that is the procedural structure established by the Florida statutes. The jury's verdict as to the appropriate sentence is advisory. The question is whether the jury was somehow given an erroneous understanding of its responsibility.

¹ See Fla. Stat. §921.141 (1985). The Supreme Court held that the division of authority between the jury and the trial judge under the Florida death penalty statute is constitutional. See Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida 428 U.S. 242 (1976). In Spaziano, the Court made reference to the fact that the jury's recommendation is entitled to some deference by the trial court. 468 U.S. at 465 - 66.

Mann v. Dugger, 817 F.2d 1471, 1485 (11th Cir. 1987) (Fay, J., dissenting) (panel opinion). Such comments are neither inaccurate nor misleading.

Moreover, in this case the prosecutor made the controversial comments during voir dire at the suggestion of defense counsel. The prosecutor was discussing death penalty concerns with the prospective jurors when one member of the venire stated that he would be unable to find the defendant guilty if it could lead to a death sentence. Trial Transcript at 105. The attorneys then held a side-bar conference with the judge. At this conference the defense counsel suggested that someone should inform the jury of the bifurcated system used in Florida to determine

guilt and sentencing.² The prosecutor followed this suggestion and gave the jury an accurate summation of its role under the

2 During the side-bar conference, defense counsel stated:

I think, first of all, I would just like to have the right to try to rehabilitate this gentleman who made these for cause statements earlier and perhaps the -- we should have a right to try to rehabilitate him in this respect. I think he is of the opinion, not understanding the bifurcated system, that, in fact, if he rendered a guilty verdict, that that in and of itself would take care of the penalty.

I think he should be told by somebody that, in fact, it's two different phases; that he can, in fact return a guilty verdict if that's the appropriate verdict; and he will have the opportunity to voice his opinion. That may satisfy it.

Trial Transcript at 106.

³ During this portion of the voir dire the prosecutor stated:

Not only for your benefit, . . . but for the benefit of the rest of the prospective members of the jury, let me jump ahead a little bit and see if I can do some clarification. The law in the State of Florida provides that in a trial for a capital offense, such as murder in the first degree, we actually have two stages or two phases of the proceedings.

The first phase relates to the guilt or the innocence of the Defendant. At that point, the State puts on its case in chief against the Defendant in an attempt to convince the jury that he is guilty of murdering Elisa Nelson, beyond and to the exclusion of every reasonable doubt. The jury, in Florida, has the opportunity to go back and to deliberate that issue. Obviously, if the jury finds him to be innocent, they come back and say so, and

supplemented the prosecutor's explanation by

he walks out of the court-room and that's the end of that.

. . . . If, on the other hand, this jury ultimately at the conclusion of the State's case, convicts, walks back into the courtroom and says that he is guilty of murder in the first degree, there then begins a separate portion of the proceeding in front of the same jury panel with additional testimony and evidence being presented, at which time you again -- these matters that were not brought to your attention in the prior portion of the trial. The jury then has the opportunity to go back and deliberate whether or not you will come back and make a recommendation of mercy to the Court.

The recommendation that you make to Judge Federico in this portion of the trial is simply a recommendation, and he is not bound by it. He may impose whatever sentence the law permits. He will have been here and will have listened to all of the testimony himself.

stating that should the jury find the defendant guilty of first degree murder, the judge would give the jury's sentencing recommendation great weight.⁴

Trial Transcript at 106 - 108.

⁴ During voir dire the following occurred:

[DEFENSE COUNSEL]: Only guilty of murder one requires a death penalty. And there are only two alternatives the Court has: One is death in the electric chair; the other is life with a minimum mandatory twenty-five years before the person becomes eligible for parole. I think a lot of people get the idea that if somebody gets a life sentence, they get out in seven years.

That isn't the case in a first degree murder. It does carry a maximum of life, a minimum mandatory of twenty-five years before a person becomes eligible. That is the alternative the judge has, one of those two.

[JUROR]: Is that the judge's discretion, or is that by law?

[DEFENSE COUNSEL]: By law, the judge only has two choices if you return a verdict of murder in the first degree. Like [the prosecutor] said, you go back and render an advisory opinion as to what you people believe is the appropriate sentence, whether you believe that the appropriate sentence is death or whether you believe the appropriate sentence is life with a minimum mandatory twenty-five years.

Now, he just doesn't disregard that and

A thorough review of the trial transcript reveals that defense counsel and the prosecutor placed equal emphasis on the advisory role of the jury.⁵ In addition,

do whatever he wants to. He is, by law, required to give your recommendation great weight, but he is also permitted to overrule your recommendation, if he desires to do so and he feels under the law he should. But he can still only do one of those two things. The law does not give him any other discretion.

He has to, ultimately, if Mr. Mann is convicted of murder in the first degree, say, I sentence you to death, life, or the minimum mandatory of twenty-five years. That's the only two options he has. Okay? Does that clear that up? Does everybody understand that?

(THEREUPON, the prospective jurors indicated affirmatively.)

Trial Transcript at 163 - 64 (emphasis added).

5 The prosecutor used the words "advisory" or "recommendation" (or derivatives thereof) during two phases of the trial. These included comments made during voir dire, see Trial Transcript at 108, 109, 110, 211, 283, 285, and during the closing argument of the sentencing phase. See Trial Transcript at 1319, 1326, 1327.

By comparison, the defense counsel used these terms just as often. These included

both lawyers indicated to the jurors that if they found the defendant guilty of first degree murder, the judge would ultimately

comments made during voir dire, see Trial Transcript at 163- 64 for text of this comment see supra note 4), 171, 173, 272, 273, 274, and during closing argument of the sentencing phase. See Trial Transcript at 1331, 1338, 1341, 1342.

determine the appropriate penalty.⁶

⁶ As the majority notes, the prosecutor made three references to the judge as the final decision maker. These included comments twice made during voir dire, see Trial Transcript at 110 - 111, 285, and once during the closing argument of the sentencing phase. See Trial Transcript at 1330.

The defense counsel, however, also indicated that the judge had the burden of choosing between a death and a life sentence. See Trial Transcript at 164 - 165 (for text of this comment, see supra note 4). During his final argument of the sentencing phase, defense counsel again spoke of the judge's responsibility as sentencer:

To begin at the very beginning, the issue here is whether this man lives, by my computation, to the age of eighty-five in prison before he can be eligible for parole or whether he dies. This judge can sentence this man, in addition to the twenty-five years minimum mandatory, he can sentence him in addition to that ninety-nine years on the kidnapping and retain jurisdiction over him for thirty-three of those years to prevent his release or his consideration for release, as I understand it, to approximately the year 2039. So, the issue that

Defense counsel's numerous comments regarding the jury's advisory role indicate that he agreed with the explanations given by the prosecutor and the trial judge. This strengthens my conviction that the prosecutor accurately stated the Florida law and did not mislead the jury. Therefore, I am unable to find that the prosecutor's statements created a Caldwell violation.

Because I believe that the prosecutor did not mislead the jury, I do not find it necessary to determine whether the trial judge's comments were sufficiently curative. I note, however, that the trial judge's statements were not misleading. The judge explained to the jury its role in the Florida sentencing scheme.

you are here to determine
is not whether he lives
among us. The issue is
whether he lives.

Trial Transcript at 1331.

The trial judge essentially repeated the explanations given by the lawyers. He told the jury that its determination of the appropriate penalty would serve as a recommendation.⁷ The judge also stated that although the final determination of ty curative. I note, however, that the trial judge's statements were not misleading. The judge explained to the jury its role in the Florida sentencing scheme.

The trial judge essentially repeated the explanations given by the lawyers. He told the jury that its determination of the appropriate penalty would serve as a recommendation.⁷ The judge also stated that although

⁷ The trial judge made several references to the advisory nature of the jury sentence. These comments occurred during post verdict instructions, see Trial Transcript at 1236, during the initial instructions of the sentencing phase, see Trial Transcript at 1252 - 1253, and during the final instructions of the sentencing phase. See Trial Transcript at 1344 - 1351.

the final determination of the appropriate penalty rested with the court, the jury had a duty to recommend the appropriate penalty in this case.⁸ One of the trial judge's last

⁸ During the initial instructions of the sentencing phase the trial judge stated:

Members of the jury, you have found the Defendant guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment. The final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

Trial Transcript at 1252.

During the final instructions to the jury in the sentencing phase, the judge stated:

Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed on the

comments before the jury retired reinforced the importance of the jury's task:

The fact that the determination of whether or not

Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory opinion based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. Your verdict should be based upon the evidence which you have heard while trying the guilt or innocence of the Defendant, and evidence which has been presented to you in this proceeding.

Trial Transcript at 1344 - 44 (There are two consecutive pages in the trial transcript numbered as 1344.)

a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment upon the sole issue which is submitted to you at this time, of whether a majority of your number recommend that the Defendant be sentenced to death or to life imprisonment.

Trial transcript at 1348 - 1349 (emphasis added). Such a closing instruction had to impress upon the jury the importance of their role in the sentencing process.

One other aspect of cases of this sort troubles me. Jurors are a cross section of our communities. They are our average citizens with differing degrees of education, sophistication, experiences and views of

government. My experience with juries convinces me that they approach such service with great dedication and awareness. In cases involving a question of whether or not the death penalty should be imposed, great concern and seriousness of purpose literally permeates the courtroom. Jurors, like judges, lose sleep and are totally preoccupied with doing what is right and correct under the law. We, as judges, should be slow to assume that such men and women have somehow been derailed or led astray.

Finding nothing in this record, when considering such in its entirety, that would mislead or tend to diminish the responsibility of the jury, I would deny relief.



EDITOR'S NOTE

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U.S. DISTRICT COURT
FILED
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JOHN R. SPANOL, JR.
CLERK

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NINETEENTH CIRCUIT,
OCTOBER TERM, 1987.

NO. 87-3873

RICHARD L. DUGGER,
Petitioner,

v.
LARRY EUGENE MANN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987
NO. 87-2073

RICHARD L. DUGGER,
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v.
LARRY EUGENE MANN,
Respondent.

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QUESTION PRESENTED

WHETHER CERTIORARI SHOULD BE GRANTED TO REVIEW AN EN BANC COURT OF APPEALS DECISION WHICH PROPERLY APPLIED THIS COURT'S SETTLED PRECEDENTS IN DETERMINING THAT FEDERAL REVIEW OF THE MERITS OF A HABEAS CORPUS PETITIONER'S CONSTITUTIONAL CLAIM WAS WARRANTED IN A CASE IN WHICH THE STATE SUPREME COURT HAD RULED ON THE MERITS OF THE CLAIM, AND WHETHER CERTIORARI SHOULD BE GRANTED WHERE THE EN BANC COURT OF APPEALS CORRECTLY DETERMINED THAT THE ANALYSIS OF CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), APPLIED TO THE HABEAS APPLICANT'S CLAIM AND THAT RELIEF WAS APPROPRIATE UNDER CALDWELL.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987
NO. 87-2073

RICHARD L. DUGGER,

Petitioner,

v.

LARRY EUGENE MANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Larry Eugene Mann, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the en banc Eleventh Circuit Court of Appeals in this case. That opinion is reported at 844 F.2d 1446 (11th Cir. 1988).

OPINIONS BELOW

Before the en banc decision in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), a panel of the Eleventh Circuit issued an opinion ordering sentencing relief on the basis of the violations of Caldwell v. Mississippi, 472 U.S. 320 (1985), which occurred in Mr. Mann's case. Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987). The State petitioned for rehearing, and the Court of Appeals vacated the panel opinion and granted rehearing. Mann v. Dugger, 828 F.2d 1498 (11th Cir. 1987). Following the en banc decision of the Eleventh Circuit, this Court granted the State's

motion to stay the Eleventh Circuit's mandate, and the State filed a petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In its petition, the State correctly recited the eighth amendment and section 921.141, Florida Statutes (1981) as controlling. Mr. Mann agrees that the eighth amendment and section 921.141, Florida Statutes (1981) are involved, as is the fourteenth amendment.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

This is a habeas corpus action by a Florida death-sentenced inmate. Summary dismissal by the district court was reversed by the Court of Appeals based upon Caldwell v. Mississippi, 472 U.S. 320 (1985), and the matter was remanded with instructions to issue the writ setting aside Mr. Mann's death sentence unless the State provided Mr. Mann with a new sentencing proceeding before a newly empaneled jury. Mann v. Dugger, 844 F.2d 1446, 1458-59 (11th Cir. 1988)(en banc). The State has petitioned this Court for a writ of certiorari, alleging that the Eleventh Circuit erroneously determined that Mr. Mann's Caldwell claim was not procedurally barred and that the Eleventh Circuit erroneously found Mr. Mann's Caldwell claim to be meritorious.

Mr. Mann's capital trial and sentencing proceedings occurred in 1981. During the penalty phase of trial, counsel for Mr. Mann requested that Mr. Mann's capital jury be instructed that the trial judge was required to give their penalty recommendation great weight in determining an appropriate sentence (R. 2357). The requested instruction was denied (*Id.*). The trial prosecutor thereafter made innumerable misleading, inaccurate, and false comments to Mr. Mann's sentencing jury, comments whose apparent purpose was to and which did in fact serve to diminish the jurors' sense of responsibility for the sentencing task that

Florida law would call on them to perform. The trial judge, through his own comments and instructions, not only failed to correct the prosecutor's persistent improper and inaccurate statements, but approved them and took them a step further, thus enhancing the harm. The prosecutor's and trial judge's statements were discussed at length in Mr. Mann's en banc Eleventh Circuit initial and reply briefs (Respondent's Supplemental Appendix, 1 and 3); excerpts from the record reflecting the statements, comments, and instructions herein at issue were appended to Mr. Mann's initial en banc brief and are reproduced in the supplemental appendix filed with this brief in opposition (Respondent's Supplemental Appendix, 2).¹ Those matters will not be detailed again herein. In this regard, Mr. Mann respectfully refers the Court to his supplemental appendix.

On direct appeal, the Florida Supreme Court affirmed Mr. Mann's conviction, but vacated the death sentence and remanded the matter to the trial court for resentencing. Mann v. State, 420 So. 2d 578, 581 (Fla. 1982). At resentencing, counsel for Mr. Mann requested that a new sentencing jury be empaneled (R. 3-4), because Florida law required the trial judge to give great weight to the jury recommendation and the prior jury recommendation was tainted by consideration of an aggravating circumstance invalidated by the Florida Supreme Court (R. 34-36). That motion was denied (R. 7, 36), and Mr. Mann was resentenced to death by the judge (R. 14-15).

On direct appeal from resentencing, the Florida Supreme Court affirmed the death sentence, without addressing Mr. Mann's claim that a new jury should have been empaneled for resentencing. Mann v. State, 453 So. 2d 784 (Fla. 1984).

¹For the Court's convenience the en banc Eleventh Circuit briefs and the record excerpts attached to Mr. Mann's initial en banc brief are being filed with this Court and are included in the supplemental appendix to this brief in opposition.

After the issuance of this Court's 1985 Caldwell v. Mississippi decision, in January of 1986, Mr. Mann filed a Motion to Vacate Judgments and Sentences pursuant to Fla. R. Crim. P. 3.850, in which he claimed, *inter alia*, that his sentence of death was obtained in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). This issue was raised as ineffective assistance of counsel, as prosecutorial misconduct, and as an independent claim (See Motion to Vacate, Claims IV, VI, and VII). At the same time, Mr. Mann also filed an Original Petition for Writ of Habeas Corpus in the Florida Supreme Court, raising the Caldwell claim as both fundamental error and ineffective assistance of appellate counsel (See Petition for Writ of Habeas Corpus, Claims I and IX). The State did not file a response to either the Motion to Vacate or the Petition for Writ of Habeas Corpus.

Neither the trial court nor the Florida Supreme Court held oral argument on the motion or petition. See Mann v. State, 482 So. 2d 1360, 1361 and n.* (Fla. 1986). After the trial court's summary denial, in a single opinion involving both the appeal from the denial of the Motion to Vacate and the Petition for Writ of Habeas Corpus, the Florida Supreme Court found Mr. Mann's post-conviction claims, including the Caldwell claim, to be without merit:

. . . A comparison of the original trial record clearly and conclusively refutes any claim that there was any constitutional infirmity in the trial. The same is true of the appellate process. Although Mann urges vehemently numerous grounds for habeas corpus relief, each is either refuted or is insufficient for relief.

In conclusion, we are satisfied that this was a well and conscientiously tried case by counsel, the trial judge, and the jury. Appellate counsel and this Court have zealously fulfilled their review responsibilities.

Mann v. State, 482 So. 2d 1360, 1362 (Fla. 1986). The Court then denied Rule 3.850 and habeas corpus relief, and stated that no petition for rehearing would be entertained. *Id.*

Following the Florida Supreme Court's denial of relief, Mr. Mann filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida. That court denied all relief, and Mr. Mann appealed to the United States Court of Appeals for the Eleventh Circuit. A panel of the Eleventh Circuit affirmed the District Court's denial of relief as to the conviction, but held that Mr. Mann was entitled to resentencing under Caldwell. Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987). In reaching the merits of Mr. Mann's Caldwell claim the panel opinion noted that the Florida Supreme Court had ruled on the merits of Mr. Mann's claim. Id. at 1481.

The Eleventh Circuit granted the State's petition for rehearing, vacated the panel opinion, and set the case for rehearing en banc. Mann v. Dugger, 828 F.2d 1498 (11th Cir. 1987). The en banc Eleventh Circuit found that Mr. Mann's Caldwell claim was not procedurally defaulted because the Florida Supreme Court had disposed of it on the merits, Mann v. Dugger, 844 F.2d 1446, 1448 n.4 (11th Cir. 1988), and held that Mr. Mann was entitled to resentencing under Caldwell. Id., 844 F.2d at 1448. The State has petitioned this Court for a writ of certiorari to review the judgment of the Eleventh Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

- A. THE DECISION BELOW CORRECTLY APPLIED THIS COURT'S PRECEDENTS AND WAS IN ACCORD WITH ALL OTHER CIRCUIT COURTS OF APPEAL IN DETERMINING THAT MR. MANN'S CALDWELL CLAIM WAS NOT PROCEDURALLY BARRED

The bulk of the State's Petition for Writ of Certiorari asserts that the Eleventh Circuit erroneously determined that Mr. Mann's Caldwell claim was not procedurally barred. Thus, the State argues, this Court should review the Eleventh Circuit's judgment in order to (1) "preserve" the doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977), and (2) reconcile a purported conflict between the Circuit Courts of Appeal regarding "what constitutes

a discussion of the merits of a constitutional claim in a state appellate opinion so as to allow federal courts to entertain a procedurally defaulted issue." (Petition for Writ of Certiorari, p. 16). The State contends that this Court's pending review in Dugger v. Adams, 108 S. Ct. 1106 (1988), and Harris v. Reed, 108 S. Ct. 1107 (1988), support a grant of certiorari review in Mr. Mann's case. For the reasons discussed below, Mr. Mann respectfully submits that Adams and Harris are inapposite to the en banc Eleventh Circuit's decision in Mann, and that therefore this Court should deny the State's petition.

Adams and Harris involve the disposition of procedural questions which are simply not involved in Mr. Mann's case. In Adams, this Court has been asked to determine whether the federal habeas corpus abuse of the writ doctrine precluded consideration of the merits of Mr. Adams' claim under Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), and whether the state Supreme Court's reliance on a procedural bar also precluded federal review of the Caldwell claim. In Harris, this Court has been asked to determine whether federal habeas corpus review of a claim is proper when the state court addresses both procedural default and the merits of a claim in denying relief. Harris v. Reed, 108 S. Ct. 1107 (1988).

None of these questions was or is at issue in Mr. Mann's case. To the contrary, Mr. Mann's case involves the straightforward federal review of a constitutional claim which was decided on the merits in the state courts. The claim was presented in Mr. Mann's first and only federal habeas corpus petition, and therefore abuse of the writ is clearly not involved. Moreover, the Florida Supreme Court reviewed Mr. Mann's claim on its merits, without mentioning a procedural bar, Mann v. State, 482 So. 2d 1360, 1361-62 (Fla. 1986), and the en banc Eleventh Circuit therefore found federal habeas corpus merits review proper:

We find that the claim is not procedurally barred. Although petitioner failed to raise the claim on direct appeal, he did raise it in his Rule 3.850 motion. The circuit court denied that motion and petitioner appealed to the Supreme Court of Florida. In disposing of the appeal, the supreme court stated that its review of the record "clearly and conclusively refute[d] any claim that there was any constitutional infirmity in the trial." Mann v. State 482 So. 2d 1360, 1362 (Fla. 1986) (emphasis added). We interpret this statement as indicating that the supreme court considered the merits of each claim in petitioner's Rule 3.850 motion, including the Caldwell claim. Since the Supreme Court of Florida therefore chose not to enforce its own procedural default rule, federal habeas review of the claim is not barred.

Mann v. Dugger, 844 F.2d at 1448 n.4. It is in this context that the Petitioner's bald assertions should be considered.

1. The circumstances surrounding Mr. Mann's presentation of the Caldwell claim to the state courts

The Florida Supreme Court ruled only on the merits of Mr. Mann's Caldwell claim, without even mentioning a procedural bar. Mr. Mann had presented the merits of his Caldwell claim to the Florida state courts in his Motion to Vacate (Fla. R. Crim. P. 3.850) as well as in his state habeas corpus petition before the Florida Supreme Court.

The State did not file a response to either the Motion to Vacate or the state habeas corpus petition. Neither the trial court nor the Florida Supreme Court held oral argument on the motion or the petition. In its combined ruling on the appeal from the denial of the Motion to Vacate and the state habeas petition, the Florida Supreme Court denied relief on the merits of various claims presented by Mr. Mann, including the Caldwell claim, writing:

It is obvious and clear that present counsel's complaint of trial counsel's handling of the trial would not have affected the truth-seeking process, the evaluation of the evidence, the proper application of the law, or the outcome of the case. A comparison of the original trial record clearly and conclusively refutes any claim that there was any constitutional infirmity

in the trial. The same is true of the appellate process. Although Mann urges vehemently numerous grounds for habeas corpus relief, each is either refuted or is insufficient for relief.

In conclusion, we are satisfied that this was a well and conscientiously tried case by counsel, the trial judge, and the jury. Appellate counsel and this Court have zealously fulfilled their review responsibilities.

Mann v. State, 482 So. 2d 1360, 1361-62 (Fla. 1986) (emphasis added).

2. The Eleventh Circuit correctly determined that the Florida Supreme Court ruled on the merits of Mr. Mann's Caldwell claim and thus properly recognized that a Sykes "cause" and "prejudice" analysis was unnecessary in Mr. Mann's case

Under Wainwright v. Sykes, 433 U.S. 72 (1977), federal habeas corpus review is not available when a state prisoner's constitutional claim has been procedurally barred by the state courts unless the petitioner can demonstrate cause for and prejudice resulting from the procedural bar. Sykes, 433 U.S. at 87. As Sykes itself explains, however, its rule applies only to "contentions of federal law which were not resolved on the merits in the state proceeding . . ." Id. at 87 (emphasis in original).

The Wainwright v. Sykes procedural default analysis is based on the understanding that "considerations of comity" require that federal courts give appropriate respect to an "adequate and independent state ground" on which a state court has relied to reject a federal claim. 433 U.S. 72, 78-79, 84 (1977), quoting Francis v. Henderson, 425 U.S. 536, 538-39 (1976). However, when the state court does not "indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979). See also Wainwright v. Greenfield, 106 S. Ct. 634, 637 n.3 (1986) (noting, in habeas corpus case, that because the state appellate court addressed the issue on the merits, the State's

procedural bar arguments would be rejected); Engle v. Isaac, 456 U.S. 107, 135 n.44 (1982) (federal review appropriate when state courts exercise, the right to waive state procedural rule).

A similar analysis is applied when this Court is asked to review state court opinions by petition for writ of certiorari. See, e.g., Mills v. Maryland, 108 S. Ct. 1860, 1863 n.3 (1988) (federal jurisdiction over federal constitutional question established when state appellate court opinion speaks to merits review); see also Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985); James v. Kentucky, 466 U.S. 341, 348-49 (1984); Johnson v. Mississippi, 56 U.S.L.W. 4561, 4563 (June 13, 1988). As the Court explained in Caldwell itself:

The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. See Ulster County Court v. Allen, 442 U.S. 140, 152-154, 99 S. Ct. 2213, 2222-2223, 60 L.Ed.2d 777 (1979). Moreover, we will not assume that a state-court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Michigan v. Long, 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." Id., at 1041, 103 S. Ct., at 3476.

An examination of the decision below reveals that it contains no clear or express indication that "separate, adequate, and independent" state-law grounds were the basis for the court's judgment.

Caldwell v. Mississippi, 472 U.S. at 327 (emphasis added).

Under this Court's settled precedents, see, e.g., County Court of Ulster County v. Allen, supra; Wainwright v. Greenfield, supra, it is now well-established that before reaching the Sykes

cause and prejudice analysis, a federal habeas court must determine whether the state appellate court invoked a procedural bar or whether the state court opinion spoke only to merits review. In making this determination, a federal habeas court should look to the law of the state and the history of the litigation. Allen, 442 U.S. at 149. Factors to examine include whether the State argued a procedural bar to the state courts and whether the state court opinion relied upon procedural default or the court's view of the merits of the claim. Allen, 442 U.S. at 152-53; see also Wainwright v. Greenfield, supra, 106 S. Ct. at 637 n.3. This Court's precedents also make clear that of greatest significance is whether the state appellate opinion contains a "plain statement" indicating "clearly and expressly" that the state court relied on an adequate and independent state procedural ground barring federal review. Michigan v. Long, 463 U.S. 1032, 1041 (1983). The state court must "actually have relied on the procedural bar as an independent basis for its disposition of the case" in order to foreclose federal review. Caldwell v. Mississippi, 472 U.S. at 327, citing Ulster County Court v. Allen and Michigan v. Long. Absolutely no such "plain statement" or express and clear reliance on a state procedural rule is reflected in the Florida Supreme Court's Mann opinion. See 482 So. 2d at 1361-62. Moreover, as discussed below, the Petitioner never argued procedural default before the state courts, the history of the litigation of Mr. Mann's case reveals that the state appellate court disposed of Mr. Mann's claim on the merits, and the history of the Florida Supreme Court's treatment of post-conviction litigants' Caldwell claims -- both before and after Mr. Mann's state court pleadings were disposed of -- reveals that the procedural bar which the Petitioner now asserts before this Court is neither "firmly established," nor "regularly" and "strictly" enforced or followed. See James v. Kentucky, 466 U.S. 341, 348-49 (1984); Johnson v. Mississippi, 56

U.S.L.W. 4561, 4563 (June 13, 1988); Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985).

The Eleventh Circuit applies the Allen analysis when determining whether a state court has ruled on the merits of a claim, and did so in Mr. Mann's case. Regarding the State's contention that Mr. Mann's Caldwell claim was barred by procedural default, the Eleventh Circuit explained:

We find that the claim is not procedurally barred. Although petitioner failed to raise the claim on direct appeal, he did raise it in his Rule 3.850 motion. The circuit court denied that motion and petitioner appealed to the Supreme Court of Florida. In disposing of the appeal, the supreme court stated that its review of the record "clearly and conclusively refute[d] any claim that there was any constitutional infirmity in the trial." Mann v. State, 482 So. 2d 1360, 1362 (Fla. 1986) (emphasis added). We interpret this statement as indicating that the supreme court considered the merits of each claim in petitioner's Rule 3.850 motion, including the Caldwell claim. Since the Supreme Court of Florida therefore chose not to enforce its own procedural default rule, federal habeas review of the claim is not barred. See Oliver v. Wainwright, 795 F.2d 1524, 1528-29 (11th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1380, 94 L.Ed.2d 694 (1987); Campbell v. Wainwright, 738 F.2d 1573, 1576-77 (11th Cir. 1984), cert. denied, 475 U.S. 1126, 106 S. Ct. 1652, 90 L.Ed.2d 195 (1986); Rogers v. McMullen, 673 F.2d 1185, 1188 (11th Cir. 1982), cert. denied, 459 U.S. 1110, 103 S. Ct. 740, 74 L.Ed.2d 961 (1983).

Mann v. Dugger, 844 F.2d 1446, 1448 n.4 (11th Cir. 1988) (en banc).

In finding that Mr. Mann's Caldwell claim was not barred by procedural default, the Eleventh Circuit relied upon and properly followed this Court's settled precedents. The authorities recited in the Eleventh Circuit's opinion follow the Sykes rule that the cause and prejudice test applies only to claims which are barred by the state courts' application of an adequate and independent state procedural rule; those authorities follow the Long requirement that the state court opinion must contain a "plain statement" that the state court relied upon an adequate and independent state ground barring federal review; and, those

authorities also follow the Allen rule that federal review is proper when a federal constitutional claim has been disposed of on the merits by the state appellate court.

Thus, in Oliver v. Wainwright, 795 F.2d 1524 (11th Cir. 1986), the court found it unnecessary to decide whether the Sykes cause and prejudice standard applied to the petitioner's claim because the federal court's analysis demonstrated that the state court had ruled on the merits of the claim. Id. at 1528-29. The court determined that the state court opinion provided no indication that the state court relied upon a procedural bar; thus Allen permitted the federal court to review the claim on the merits. Oliver, supra, at 1528-29. Similarly, in Campbell v. Wainwright, 738 F.2d 1573 (11th Cir. 1984), the court found that a state court ruling which stated that some claims were procedurally barred while others were without merit permitted federal habeas review of the claims because the ruling did not expressly state which claims were barred and which were not. Id. at 1577. Finally, Rogers v. McMullen, 673 F.2d 1185 (11th Cir. 1982), followed Sykes in holding that where the state supreme court reached the merits of a constitutional claim, Sykes did not foreclose federal habeas review. Id., 675 F.2d at 1188.

Contrary to the Petitioner's assertions, this is not a case where the Florida Supreme Court summarily denied relief without an opinion, where that court spoke in the alternative, or even where the court's holding was ambiguous.² In fact, the Florida

²In this latter situation, of course, federal review would not be barred, given the Florida Supreme Court's history of excusing its procedural rules and reaching the merits of post-conviction capital litigants' claims in a number of cases. See *Amicus curiae* brief of National Legal Aid and Defenders Association, Dugger v. Adams, No. 87-121 (summarizing Florida Supreme Court opinions). If the Florida Supreme Court opinion were to be characterized as "ambiguous" -- an unlikely proposition given the opinion's lack of any express reliance on a state procedural rule and the fact that the state appellate

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Supreme Court's opinion could not be more "plain": the court said that the record "refutes any [Rule 3.850] claim that there was any constitutional infirmity" in the trial; the court said that each claim in the state habeas petition "is either refuted or is insufficient for relief." Mann, 482 So. 2d at 1362 (emphasis supplied).³ Mr. Mann's Caldwell claim was presented in his Rule 3.850 motion and in his state court habeas corpus action. With regard to each pleading, the Florida Supreme Court denied the claim on the merits. Thus, the cases recited by the State in support of its contention that the Eleventh Circuit wrongly interpreted a "silent" or "ambiguous" state court opinion are absolutely inapplicable to this case. The Florida Supreme Court was not silent or ambiguous, but unmistakably clear -- it believed Mr. Mann's Caldwell claims to be without merit.

Further, even under the analyses employed by other Circuit Courts of Appeal -- with which the State argues the Eleventh Circuit is in conflict -- the Florida Supreme Court's opinion would be determined to be a merits ruling. For example, the State contends that the Second Circuit "interprets a silent state opinion as a decision resting on procedural grounds . . . while treating ambiguous language in a state opinion as a ruling on the merits. . . ." (Petition for Writ of Certiorari, p. 17). Setting aside for the moment the fact that the Florida Supreme Court opinion in Mann was neither silent nor ambiguous, the State's

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court's opinion spoke only to a rejection of the merits of Mr. Mann's claims -- the very ambiguity would defeat any adequacy and independence which could be ascribed to the Petitioner's asserted procedural rule. See Oliver, *supra*; Campbell, *supra*; County Court of Ulster County v. Allen, *supra*. This is especially so given the Florida Supreme Court's history of inconsistently applying its procedural rules in post-conviction cases such as Mr. Mann's. See section A(3), *infra*.

³The Florida Supreme Court's opinion in Mr. Mann's case does not even come close to the Michigan appellate court's opinion found insufficient to foreclose federal review in Long.

description of the Second Circuit's analysis is too facile.⁴ When faced with a "silent" state court affirmance, the Second Circuit looks to other factors to determine whether the state court invoked a procedural bar or ruled on the merits of the case: its determination depends upon how the State responded to claims which might be subject to a procedural bar. Martinez v. Harris, 675 F.2d 51, 54 (2d Cir. 1982). The State may argue that the claim is subject to procedural default; the State may only address the merits of the claim; or the State may argue in the alternative. *Id.* If the State calls the procedural bar to the attention of the state court, the Second Circuit interprets a "silent" affirmance as resting on procedural grounds. *Id.*: see also Stepney v. Lopes, 760 F.2d 40, 44 (2d Cir. 1985). However, this analysis does not apply where the state appellate court issues a written opinion. In that case, "the grounds stated in the written opinion control a federal court's inquiry." Rosenfeld v. Dunham, 820 F.2d 52, 54 (2d Cir. 1987). In the Second Circuit, Mr. Mann's Caldwell claim would be determined on the merits: The State filed no responsive pleadings in the state courts and no oral arguments were held. Even if the Florida

⁴When the Second Circuit refers to "silent" affirmances it is discussing cases in which the state appellate court does not write an opinion, but rather affirms a conviction in a one-word or one-line summary order. Counsel's research has disclosed no case in which the Second Circuit has applied its "silent" affirmance rule where, as in Mann, the state appellate court issues a written opinion. The Second Circuit would not apply its "silent" affirmance rule to Mr. Mann's case, but would review the case in accordance with the Eleventh Circuit's analysis. See Rosenfeld v. Dunham, 820 F.2d 52, 54 (2d Cir. 1987). The Eleventh Circuit has, in fact, adopted the Second Circuit's analysis with regard to "silent" (one-word/one-line summary affirmance) state appellate court affirmances. See Campbell v. Wainwright, 738 F.2d at 1578 (adopting Second Circuit's Martinez v. Harris, 675 F.2d 51 (2d Cir. 1982), analysis). Of course, Mr. Mann's case does not involve a one-word/one-line summary affirmance, but rather involves a formal state appellate court opinion. The Second and Eleventh Circuits' "silent" affirmance rule is therefore inapplicable to Mr. Mann's case. Rather, the appropriate analysis is that of Allen, Long, Caldwell, and Greenfield. That is the analysis that the Eleventh Circuit applied.

Supreme Court had issued a "silent" affirmance in Mr. Mann's case, that Court had no grounds before it except the merits of Mr. Mann's claims. But the Florida Supreme Court was not "silent", and its written opinion clearly discusses only the merits of Mr. Mann's Motion to Vacate and state habeas petition, applying no procedural bar to Mr. Mann's Caldwell claim.

Similarly, the Fifth Circuit looks to the history of the case to determine whether a state court was aware of a procedural default when the state court issues a "silent" affirmance and looks to the opinion itself when the state court writes. Preston v. Maggio, 705 F.2d 113, 116 (5th Cir. 1983); see also Thompson v. Lynaugh, 821 F.2d 1080, 1082 (5th Cir. 1987). The same is true in the Sixth Circuit, Shepard v. Foltz, 771 F.2d 962, 965 (6th Cir. 1985); Raper v. Mintzes, 706 F.2d 161, 164 (6th Cir. 1983), and in the Eighth Circuit, Euell v. Wykwick, 675 F.2d 1007, 1008-09 (8th Cir. 1982). In fact, all of the Circuits are consistent in this regard. Under the analysis of any circuit, Mr. Mann's Caldwell claim would be deemed to have been determined on the merits by the state appellate court.

In accord with this Court's precedents and with the analyses employed in the other Circuit Courts of Appeal, the Eleventh Circuit correctly determined that the Florida Supreme Court ruled on the merits of Mr. Mann's Caldwell claim and thus that federal habeas review was proper. The Eleventh Circuit examined the Florida Supreme Court's Mann opinion and correctly found that it discussed only merits, without mentioning a procedural bar.⁵ The

⁵In Maynard v. Cartwright, 108 S. Ct. 1853 (1988), this Court recently noted, "We normally defer to Courts of Appeals in their interpretation of state law. . . ." Id. at 1857. Mr. Mann respectfully notes that the *en banc* Eleventh Circuit reviews all federal habeas actions arising from Florida convictions, and has among its ranks federal jurists from the state of Florida (including former Florida state court judges); that Court is therefore intimately familiar with the practice of Florida's courts and especially with the practice of the Florida Supreme (footnote continued on next page)

Eleventh Circuit's ruling does not denigrate the doctrine of Sykes, with which it is clearly in accord, and does not conflict with the analysis employed by any other circuit.

3. The Florida Supreme Court has not consistently applied a procedural bar to Caldwell claims in collateral proceedings

In order to preclude a federal court from reviewing a state prisoner's constitutional claim, any state procedural bar invoked by the state court must be "adequate" and "independent". County Court of Ulster County v. Allen, 442 U.S. 140, 147 (1979). Thus, only a "firmly established and regularly followed state practice can prevent implementation of federal constitutional rights."

James v. Kentucky, 466 U.S. 341, 348-49 (1984)(citation omitted); see also Barr v. City of Columbia, 378 U.S. 146, 149 (1964) ("We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right of review"); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly"). As this Court has again recently explained: "[A] state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" Johnson v. Mississippi, 56 U.S.L.W. 4561, 4563 (June 13, 1988)(citations omitted). Caldwell itself makes the same point. Id. at 327-28 (Merely existence of state procedural rule is insufficient to preclude federal review; rule must be strictly and regularly followed and must be actually

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Court. The Eleventh Circuit is thus in a much better position to discern the largely factually-based question of whether the state Supreme Court intended to reach the merits of a federal constitutional claim or apply a procedural bar. Maynard v. Cartwright, *supra*; see also Butner v. United States, 440 U.S. 48, 58 (1979) ("[F]ederal judges who regularly deal with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.")

relied upon "as an independent basis for [the state appellate court's] disposition of the case"), citing Ulster County Court v. Allen and Michigan v. Long.

The State's petition broadly asserts that "the Florida Supreme Court has, without exception, held that either the failure to object at the trial level or the failure to raise the matter on direct appeal results in a procedural default of [a] Caldwell claim." (Petition for Writ of Certiorari, p. 8)(emphasis supplied). This statement is a gross oversimplification, to say the least, of the status of Caldwell claims in Florida collateral proceedings.

This Court issued its Caldwell opinion on June 11, 1985. Caldwell, 105 S. Ct. 2633 (1985). Three months later, the Florida Supreme Court ruled on the merits of a Caldwell claim raised in a successive motion for post-conviction relief. Darden v. State, 475 So. 2d 217, 221 (Fla. 1985).⁶ In February, 1986, the Florida Supreme Court denied Mr. Mann's Motion to Vacate and state habeas Caldwell claims on the merits. Mann, 482 So. 2d at 1361-62. Since that time, the Florida Supreme Court has been far from consistent in addressing Caldwell claims raised in collateral proceedings.

The Florida Supreme Court has several times indicated that Caldwell claims would be entertained in initial collateral proceedings, but are not available in successive motions or petitions. For example, in Card v. Dugger, 512 So. 2d 829 (Fla. 1987), in response to a Caldwell claim raised in a successive state habeas corpus petition, the court held:

Card filed his first petition for habeas corpus on June 2, 1986, and Caldwell was decided by the United States Supreme Court in 1985. . . . [A] second petition filed after

⁶This Court thereafter also ruled on the merits of that post-conviction litigant's Caldwell claim. See Darden v. Wainwright, 106 S. Ct. 2464, 2473 n.15 (1986).

Caldwell which raises this issue for the first time constitutes an abuse of the writ.

Id. at 831. Similarly, in Delap v. State, 513 So. 2d 1050 (Fla. 1987), in response to a Caldwell claim raised in a successive motion for post-conviction relief, the court held:

Delap's third claim, predicated upon Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), should have been raised, if at all, in Delap's first motion for postconviction relief which was filed more than six months after the United States Supreme Court's opinion in Caldwell.

Id. at 1051.

In Combs v. State, 525 So. 2d 853 (Fla. 1988), decided in February of this year -- a case involving the presentation of a Caldwell claim in a capital litigant's initial state court post-conviction action -- the Florida Supreme Court ruled on the merits of the Caldwell claim and analyzed the issue at length in an effort to demonstrate that the issue in Mr. Combs' case was without merit. Combs, 525 So. 2d at 855-58. Cf. id. at 861 (Barkett, J., specially concurring) ("Mann was based not on some fault inherent in the instructions themselves, but on the prosecutor's misleading remarks and the judge's failure to correct them.")

Most recently, in Darden v. Dugger, 521 So. 2d 1103 (Fla. 1988) (Darden II), in response to a Caldwell claim raised in a successive state habeas corpus petition, the court held:

Darden's second claim, that the jury was mislead as to its sentencing role in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), was previously rejected by this Court in Darden v. State, 475 So. 2d at 221. . . . Darden takes the position that because "this very issue is now pending before the United States Supreme Court in Adams v. Dugger, No. 87-121" . . . this Court should issue a stay of execution and preserve its jurisdiction to address this claim after the issuance of Adams. If this were the first time Darden presented this Caldwell claim to this Court, such a stay may be warranted. However, because this claim was previously reject[ed] by this court, we

decline to issue a stay to reconsider the issue.

Id. at 1104-05 (footnotes and citations omitted).

As is apparent from the Florida Supreme Court's holdings regarding the availability of collateral proceedings for raising Caldwell claims, had any procedural bar been applied to Mr. Mann's Caldwell claim, such a bar could not be deemed adequate and independent. Prior to Mr. Mann's state collateral proceedings, the Florida Supreme Court reviewed a Caldwell claim on the merits, Darden, supra, and since Mr. Mann's state proceedings, the Florida Supreme Court has been inconsistent in applying a procedural bar to Caldwell claims. Combs; Card; Delap; Darden II, supra. Under Florida's law, see Allen, 442 U.S. at 149, claims such as Mr. Mann's are not clearly subject to a procedural bar. See Adams v. Dugger, 816 F.2d 1493, 1497 (11th Cir. 1987) ("Adams' Caldwell claim is the very type of claim for which Florida created the Rule 3.850 procedure.") Under the Florida Supreme Court's practice, discussed above, there exists no "firmly established and regularly followed state practice . . . prevent[ing]" federal review, see James, 466 U.S. at 348-49, with regard to Caldwell claims such as Mr. Mann's, nor does the Florida Supreme Court "strictly and regularly" apply a procedural bar to such issues. Johnson, supra, 56 U.S.L.W. at 4563. Prior to Mr. Mann's state court collateral proceedings, Darden, supra, and after Mr. Mann's state court collateral proceedings, Combs, supra, the Florida Supreme Court has reviewed the merits of post-conviction litigants' Caldwell claims. Of course, the Florida Supreme Court reviewed the merits in Mr. Mann's case, see sections A(1) and (2), supra, a ruling in conformity with its practice in other cases.

4. Neither Adams nor Harris will control the disposition of Mr. Mann's Caldwell claim.

Both cases relied upon in the Petition for Writ of Certiorari involve the disposition of procedural questions which

are not at issue in Mr. Mann's case. In Dugger v. Adams, 108 S. Ct. 1106 (1988), this Court has been asked to determine whether the federal habeas corpus abuse of the writ doctrine precluded consideration of the merits of Mr. Adams' Caldwell claim, and whether the state Supreme Court's reliance on a procedural bar also precluded federal review of the Caldwell claim. Neither of these questions was or is at issue here. Rather, Mr. Mann's case involves the straightforward federal review of a constitutional claim which was decided on the merits in the state courts. As stated in the introduction to this section, Mr. Mann's claim was presented in his first and only federal habeas corpus petition; abuse of the writ is therefore clearly not involved. Further, in Adams, the Florida Supreme Court clearly and unequivocally found Mr. Adams' claim an abuse of the post-conviction process and barred by procedural default. Adams v. State, 484 So. 2d 1216, 1217 (Fla. 1986). The Florida Supreme Court, on the other hand, reviewed Mr. Mann's claim on the merits, without even mentioning a procedural bar. Mann, 482 So. 2d at 1361-62. Thus, the Eleventh Circuit correctly considered the federal constitutional questions involved in Mr. Mann's claim, and the disposition of the abuse and default questions presented to this Court in Adams will not affect correctness of that decision.

In Harris v. Reed, 108 S. Ct. 1107 (1988), this Court has been asked to determine whether federal habeas corpus review of a claim is proper when the state court applies a procedural bar and discusses the merits of a claim in denying relief. The lower court in Harris described the state court opinion as follows:

In examining Harris' post-conviction petition, the state court noted that failure to present an issue on direct appeal precludes post-conviction review unless the nature of the issue is such that it could not have been raised on direct appeal. The district court then examined the trial court record and found that all grounds, save that relating to the alibi witnesses, could have been presented on direct appeal. Without

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expressly finding that all other grounds were waived, the court then proceeded to a short discussion of general standards for judging a claim of ineffective counsel. Next, the court analyzed both trial counsel's failure to call alibi witnesses, as well as other grounds that could have been raised on direct appeal and concluded that Harris had received the effective assistance of his trial counsel.

Harris v. Reed, 822 F.2d 684, 687 (7th Cir. 1987).⁷ The Seventh Circuit distinguished this state court opinion from those which "completely ignored waiver" and those which "expressly relied, in part, on waiver," *id.*, concluding that, although the state court opinion was "ambiguous", the state court intended to find all but one claim waived and only alternatively rejected the claims on the merits. *Id.* Federal habeas review was therefore precluded. *Id.* As is apparent from the discussion in the preceding section, this is not the situation in Mr. Mann's case, where the Florida Supreme Court spoke only in terms of merits review and denied Mr. Mann's claim on the basis of such review. The Florida Supreme Court neither expressly relied on any procedural bar nor made alternative rulings with regard to Mr. Mann's Caldwell claim. Its opinion was unambiguous: relief was denied on the merits. Accordingly, the Eleventh Circuit properly exercised its authority to review the federal questions involved in Mr. Mann's claim, and the disposition of Harris before this Court will not affect the propriety of that decision.

⁷It is noteworthy that nowhere in its Mann opinion, 482 So. 2d at 1361-62, does the Florida Supreme Court state that it would decline to consider Mr. Mann's Caldwell claims, on the basis of standard procedural grounds such as the failure to urge the issue on direct appeal. The Florida Supreme Court's opinion speaks only to merits review. As discussed throughout this brief in opposition, the central question which the Eleventh Circuit properly resolved is not whether a state procedural ground existed, but whether the state appellate court itself expressly indicated that the federal claim would be rejected because of a state court procedural default. Allen, *supra*; Caldwell, *supra*. After all, "[t]he federal court's task is not to apply state procedural rules as though it stood in the state court's shoes," Euell v. Wyrick, 675 F.2d 1007, 1008 (8th Cir. 1982), but to determine if federal review would be appropriate. Allen; Caldwell; Engle v. Isaac; Wainwright v. Greenfield.

B. THE DECISION BELOW CORRECTLY DETERMINED THAT
CALDWELL V. MISSISSIPPI APPLIES TO THE FLORIDA
CAPITAL SENTENCING SCHEME

The Petition for Writ of Certiorari also urges this Court to grant certiorari review in order to correct what the Petitioner perceives as an "express and irreconcilable conflict" between the Eleventh Circuit's analysis of the application of Caldwell to the Florida capital sentencing scheme and the Florida Supreme Court's analysis. Significantly, the State does not argue that a Florida capital jury is not an integral part of the Florida capital sentencing scheme, but simply asserts broadly that the Eleventh Circuit's holding in Mann is "in irreconcilable conflict with every decision of the Florida Supreme Court on this point." (Petition for Writ of Certiorari, p. 8) (emphasis supplied). The State is wrong to assert that Caldwell does not apply to the Florida capital sentencing scheme and is wrong to assert that "every decision" of the Florida Supreme Court has so held; the Florida Supreme Court's own opinions make undeniably plain.

Initially, Mr. Mann notes, as did the Eleventh Circuit, that the federal courts, not state courts, are the arbiters of claims grounded on the federal constitution. Thus, although the Florida Supreme Court has thus far refused to grant relief on a Caldwell claim, the Eleventh Circuit is not required to follow the Florida Supreme Court's interpretation of the federal constitution:

To date, the Supreme Court of Florida has refused to grant relief on Caldwell claims. . . . We do not read these cases as necessarily holding that a Caldwell violation could never occur in a Florida case. . . . In any event, we are not bound by a state court's application of federal constitutional principles. We look to that court's pronouncements only to determine the nature of the sentencing process; we independently decide how the federal Constitution applies to claims pertaining to that process as thus defined.

Mann, 844 F.2d at 1455 n.10. Cf. Sandstrom v. Montana, 442 U.S. 510, 516-17 (1979) ("The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption

under Montana law, but it is not the final authority on the interpretation which a jury could have given the instruction."). See also Caldwell, *supra*, 472 U.S. at 326 (relief granted pursuant to eighth and fourteenth amendments notwithstanding state Supreme Court opinion which "flatly rejected the contention that the prosecutor's comments could constitute a violation of the Eighth Amendment . . .").

After examining the Florida Supreme Court's pronouncements to determine the nature of Florida's capital sentencing process,⁸ cf. Sandstrom, *supra*, 442 U.S. at 516-17, the en banc decision of the Eleventh Circuit in Mann carefully set out why Caldwell is applicable in Florida, despite the fact that Florida juries are not the "final" sentencers as they are in Mississippi. The court identified two factors evident from the Florida Supreme Court's case law which demonstrate that although Florida capital juries recommend a sentence to the trial judge, who then imposes sentence, the jury's recommendation is of such significance that Caldwell's concerns are undeniably applicable:

In light of the case law, we conclude that the Florida jury plays an important role in the Florida capital sentencing scheme. The case law reflects an interpretation of the death penalty statute that requires the trial court to give significant weight to the jury's recommendation, whether it be a recommendation of life imprisonment or a recommendation of death. The case law also reflects, we think, an insightful normative judgment that a jury recommendation of death has an inherently powerful impact on the trial judge.

Because the jury's recommendation is significant in these ways, the concerns

⁸Mr. Mann's en banc briefs to the Eleventh Circuit presented a detailed analysis of Florida's capital sentencing process and of the Florida Supreme Court's opinions construing that process and the critical nature of the jury's role. In the interests of brevity, that analysis will not be repeated again herein. Mr. Mann's supplemental appendix filed with this brief in opposition includes Mr. Mann's initial and reply en banc Eleventh Circuit briefs (Apps. 1 and 3). With regard to these issues Mr. Mann respectfully refers the Court to that discussion and specifically to pages 1 through 11 of his en banc Eleventh Circuit reply brief (App. 3).

voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that has been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing.

Mann, 844 F.2d at 1454-55.

In coming to its first conclusion -- that the sentencing jury has a significant role in the Florida capital sentencing scheme -- the Eleventh Circuit relied upon four basic principles to which the Florida Supreme Court adheres regarding the administration of the capital sentencing statute. First, the Florida Supreme Court "has severely limited the trial judge's authority to override a jury recommendation of life imprisonment," Mann, 844 F.2d at 1450, steadfastly holding that a trial judge may override a jury's life recommendation only when "the facts [are] so clear and convincing that virtually no reasonable person could differ." See Mann, 844 F.2d at 1450-51 (and cases cited therein); see also en banc Eleventh Circuit Initial and Reply Briefs, Mann v. Dugger, Respondent's Supplemental Appendix 1 and 3 (and cases cited therein). The Eleventh Circuit's opinion discussed the various Florida Supreme Court cases, e.g., inter alia, Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); McCampbell v. State, 421 So. 2d 1072, 1075-76 (Fla. 1982); Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986), applying this longstanding principle of Florida capital sentencing law. The "Tedder standard" has in fact been recognized by this Court as providing a "significant safeguard" to a capital defendant. Spaziano v. Florida, 468 U.S. 447, 465 (1984).

Second, the Florida Supreme Court also accords a jury's death recommendation great deference, holding that "a jury

recommendation of death is entitled to great weight." See Mann, 844 F.2d at 1451-52 (and cases cited therein); see also Smith v. State, 515 So. 2d 182, 185 (Fla. 1987); en banc Eleventh Circuit Reply Brief of Appellant, App. 3, pp. 5-6 (and cases cited therein). The Florida Supreme Court has consistently applied this principle of Florida capital sentencing law as well. See Smith, *supra*; Stone v. State, 378 So. 2d 765, 773 (Fla. 1980); LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978).

In fact, as the en banc Eleventh Circuit explained, the Florida Supreme Court has "been influenced by a normative judgment that a jury recommendation of death carries great force in the mind of the judge." Mann, 844 F.2d at 1453. Thus, as discussed in the Eleventh Circuit's opinion, the Florida Supreme Court consistently orders resentencing in cases in which sentencing error has occurred before the jury, even if the trial judge has stated that the error did not affect his or her imposition of the death sentence. Mann, 844 F.2d 1453-54 (and cases cited therein). These cases make clear that the Florida Supreme Court "has recognized that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error." *Id.* at 1454.

Third, the Eleventh Circuit pointed out that the Florida Supreme Court's treatment of sentencing error illustrates the importance of the jury recommendation to the sentencing process: in cases in which sentencing error occurs before the jury, the Florida Supreme Court vacates the death sentence and orders resentencing before a new jury. See Mann, 844 F.2d at 1452-53 (and cases cited therein). As the Florida Supreme Court itself has explained:

This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process. Lamadline v. State, 303 So.2d 17, 20 (Fla.1974) (jury recommendation can be

"critical factor" in determining whether or not death penalty should be imposed). Under Tedder v. State, 322 So.2d 908, 910 (Fla.1975), a jury's recommendation of life must be given "great weight" by the sentencing judge. A recommendation of life may be overturned only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Id.

Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987). Thus,

[i]f the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

Id. at 659. The Florida Supreme Court's precedents have gone even further than the Eleventh Circuit's Mann opinion in stressing the critical role of the capital sentencing jury in Florida and demonstrating Caldwell's application to the Florida capital sentencing scheme:

Appellant's eighth point is that the trial court erred in giving the jury's recommendation of death greater weight than that to which it was entitled. In instructing the jury, the trial court stressed that the jury recommendation could not be taken lightly and would not be overruled unless there was no reasonable basis for it. In its sentencing order the judge noted he was imposing the sentence "independent of, but in agreement with" the jury recommendation. There is no error; this is the law. It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and Tedder v. State, 322 So.2d 908 (Fla. 1975).

Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986) (emphasis added).

The Florida Supreme Court has also explained:

The state . . . suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's

theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987) (emphasis supplied). Moreover, the Florida Supreme Court has unequivocally held that the jury's sentencing role is central and "fundamental", Riley, supra, 517 So. 2d at 657-58, while the sentencing judge's role is to serve as "a buffer where the jury allows emotion to override the duty of a deliberate determination" of the defendant's proper sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976). Clearly, contrary to the Petitioner's assertions before this Court, the Florida Supreme Court's precedents make clear that Caldwell's concerns apply in Florida. The Petitioner's assertions regarding the role of the jury in Florida's post-Furman capital sentencing scheme would assuredly not be recognized by the Florida Supreme Court. See Ferry, supra, 507 So. 2d at 1376-77.

Finally, the Eleventh Circuit pointed out that the Florida Supreme Court has ordered resentencing when prospective jurors have been excused in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), a case which "assumes . . . that the jury will play a substantive role in the sentencing decision." Mann, 844 F.2d at 1453. This is significant as well, and again demonstrates Caldwell's applicability to the Florida capital sentencing scheme.

Having evaluated all of these factors, the Eleventh Circuit concluded:

The fact of the matter is . . . that under the existing scheme in Florida the jury does share in capital sentencing responsibility. Because the jury's recommendation is a critical factor in the ultimate sentencing decision, the jury's function, like the function of any capital sentencer, must be

evaluated pursuant to eighth amendment standards.

Mann, 844 F.2d at 1454 n.10 (emphasis in original).

As the Eleventh Circuit's analysis demonstrates, the State's contention that Caldwell is not applicable to the Florida capital sentencing scheme is belied by the Florida Supreme Court's pronouncements regarding the integral and critical function of the jury in that scheme. Further, the Florida Supreme Court opinions which directly address Caldwell claims also belie the State's assertion that the Florida Supreme Court has categorically rejected Caldwell's application in Florida.

The Florida Supreme Court has not said that providing misleading, inaccurate, and/or false information to a Florida capital jury regarding its role in sentencing is acceptable. On the contrary, in rejecting Caldwell claims, the court has pointed out that the jurors in those cases were provided accurate instructions. The Florida Supreme Court has in fact emphasized that the jury should be informed of the importance of its recommendation. In Mr. Mann's case, as in Caldwell itself and unlike the various challenges to standard jury instructions based upon Caldwell decided by the Florida Supreme Court and cited in the State's petition, the prosecutor presented the sentencing jury with inaccurate, misleading, and false information regarding its sentencing role; the prosecutor's comments were then approved of and uncorrected by the trial judge's instructions. Mr. Mann's case, unlike those cited in the State's petition, falls squarely within Caldwell. As the en banc Eleventh Circuit's opinion makes clear, here as in Caldwell, "the prosecutor's remarks . . . were inaccurate and misleading in a manner that diminished the jury's sense of responsibility," Caldwell, 472 U.S. at 342 (O'Connor, J., concurring), and were then approved by the court. In Mr. Mann's case, the prosecutor's and judge's statements misle[d] the jury as to its role in the sentencing process in a way that allow[ed]

the jury to feel less responsible than it should for the sentencing decision.

Darden v. Wainwright, 106 S. Ct. 2464, 2473 n.15 (1986).

The en banc Eleventh Circuit's opinion also demonstrates that Mr. Mann's case involves far more than a simple challenge to Florida's standard instructions, cf. Combs v. State, 525 So. 2d 853, 861 (Fla. 1988) (Barkett, J., specially concurring) ("... Mann was based not on some fault inherent in the instructions themselves, but on the prosecutor's misleading remarks, and the judge's failure to correct them."), and is thus far different than those cases involving challenges to standard jury instructions based upon Caldwell which the federal appeals court and the Florida Supreme Court have reviewed. Compare Mann v. Dugger, *supra*, with Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc) (upholding penalty phase standard jury instructions against a challenge based upon Caldwell).⁹

Again, as the Florida Supreme Court itself has stated:

We find nothing erroneous about informing the jury of the limits of its sentencing responsibility, as long as the significance of its recommendation is adequately stressed. . . . Informing a jury of its advisory function does not unreasonably diminish the jury's sense of responsibility. Certainly the reliability of the jury's recommendation is in no way undermined by such non-misleading and accurate information. . . . [T]he jury's role was adequately portrayed

⁹ Caldwell's impact on Florida's death penalty scheme has been far from sweeping. Mr. Mann is in fact only the second Florida capital inmate to have been granted relief pursuant to Caldwell. Clearly, the two cases in which relief has been granted, Mann v. Dugger; Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on rehearing sub nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1988), cert. granted, 108 S. Ct. 1106 (1988), involve clear and egregious Caldwell error which is a far cry from a challenge to Florida's standard jury instructions. Mr. Mann's case, more than any other, falls squarely within the rubric of Caldwell: it involves a prosecutor's systematic misleading, inaccurate, and false statements which served to diminish the jury's sense of responsibility for its sentencing task and a trial judge's adoption of those remarks and failure to cure the harm in his instructions.

and they were in no way misled as to the importance of their role.

Pope v. Wainwright, 496 So. 2d 798, 805 (Fla. 1986). Cf. Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986) ("It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell . . . and Tedder").

Most Caldwell claims reviewed by the Florida Supreme Court have focused on Florida's standard jury instructions. That court's rejection of jury instruction based claims is not in conflict with the Eleventh Circuit's *en banc* standards, Mann, supra; Harich, supra, and is assuredly not in conflict with the specific holding of the *en banc* Eleventh Circuit in Mann.

C. THE COURT BELOW CORRECTLY DETERMINED THAT MR. MANN'S CALDWELL CLAIM REQUIRED RELIEF

1. The jurors were told by prosecutor and judge that their role in sentencing was not significant

The State's petition presents no coherent argument demonstrating that Caldwell was not violated in Mr. Mann's case. Nor could it, as the prosecutor's misleading, inaccurate, and false statements without doubt served to diminish Mr. Mann's jurors' sense of responsibility for the capital sentencing task which Florida law called on them to perform, and the trial judge's comments and instructions then failed to correct and enhance the harm (See App. 2 [record excerpts]; see also App. 1 [Eleventh Circuit *en banc* Initial Brief of Appellant, pp. 3-10, 18-43]). Moreover, the State's Petition absolutely fails to explain how it is that the prosecutor's "effort(s) had no effect on the sentencing decision . . ." Caldwell, supra, 472 U.S. at 341. Pursuant to Caldwell, the Eleventh Circuit properly granted relief in Mr. Mann's case.

The various misleading, improper, inaccurate, and false prosecutorial comments to Mr. Mann's capital jury were discussed at length in Mr. Mann's initial Eleventh Circuit ~~en banc~~ brief (App. 1; see also, App. 2 [record excerpts]). That detailed discussion will not be repeated again herein. The prosecutor's statements and approving judicial comments and instructions were summarized by the Eleventh Circuit, which "thorough[ly] examin[ed] . . . the trial record," Mann, 844 F.2d at 1455, as follows:

The first reference to the jury's role was made as the jury was being selected, during counsel's voir dire of the venire. The prosecutor said the following:

The recommendation that you make to Judge Federico in [the sentencing] portion of the trial is simply a recommendation, and he is not bound by it. He may impose whatever sentence the law permits. He will have been here and will have listened to all the testimony himself.

A few moments later, the prosecutor repeated this point in stronger terms:

You understand you do not impose the death penalty; that is not on your shoulders.... Again, that decision rests up here with the law, with Judge Federico. You will have the opportunity after you have heard everything there is to hear to make a recommendation to him. But it is not legally on your shoulders, though. It is not your ultimate decision. You act in that regard in an advisory capacity only.

The prosecutor repeated the point again that afternoon, in a dialogue with two veniremen:

You ... understand that the ultimate responsibility rests with the Court; that it's not the jury's responsibility?

During closing argument at the conclusion of the guilt phase of the trial, the prosecutor once again informed the jury that "[t]he matter of sentencing ultimately rests with [the] Court."

After the jury rendered its verdict of guilty, the jurors were temporarily excused from the courtroom while the court and counsel made preliminary preparations for the sentencing phase of the trial. At that time, defense counsel requested that the jury, when it returned, be instructed by the court that its sentencing recommendation would be

"entitled to great weight." The court refused to grant the request:

THE COURT: Well, I think that goes without saying. I don't know if I need to instruct them that that is so.

[DEFENSE COUNSEL]: I think it is. The reason we would ask--

THE COURT: That's something that I need to do after they make their recommendation, and I will give it great weight.

[DEFENSE COUNSEL]: I know, but they need to know that so they know we're not up there just--

THE COURT: I think the standard instructions bring home to them that it is very important that they, you know, [d]o not act hastily or without due regard to the gravity of these proceedings, that they should carefully weigh and sift and consider the evidence. I think that's sufficient.

Notwithstanding his apparent understanding of the sentencing jury's function, the judge informed the jurors when they returned to the courtroom that "[t]he final decision as to what punishment shall be imposed rests solely with the judge of this court." The prosecutor repeated the point in the final statement of his closing argument at the conclusion of the sentencing phase:

What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico. That is his sworn position in the system. He's heard everything you have heard. He may have the opportunity to learn more before he imposes a sentence. I think this community, as represented by this jury, should give to him the prerogative of imposing the death penalty, if that's what he ultimately feels is required in this case.

The court then read its instructions to the jury. The instructions included the following statements regarding the jury's sentencing function:

Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed on the Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be

given to you by the Court and render to the Court an advisory opinion based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

The court's instructions also included the following statements:

The fact that the determination of whether or not a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment upon the sole issue which is submitted to you at this time, of whether a majority of your number recommend that the Defendant be sentenced to death or to life imprisonment.

After the court finished reading the instructions, it ordered the jury to retire and make a decision. When the jury returned, it announced a recommendation of death. The jury was polled and then dismissed. After the bailiff had declared that "[t]he jury has left the courtroom," the judge remarked, for the record, that "[t]he court, as required by law, will give great weight to the recommendation of the jury."

Mann, 844 F.2d at 1455-56.

The State Petitioner, of course, can provide no rational explanation demonstrating that statements such as "th[e] decision rests up here with the law, with Judge Federico" (R. 1218); "it is not legally on your shoulders" (R. 1218-19); "you do not impose the death penalty . . . the Court would impose it should you find the Defendant guilty and should he find it necessary and proper in this case" (R. 1363) (emphasis added); "you both understand that the ultimate responsibility rests with the Court; that it's not the jury's responsibility?" (R. 1393); and

What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico.

That is his main position in this system.

He's heard everything you have heard.

He may have the opportunity to learn more before he imposes a sentence.

I think this community, as represented by this jury, should give to him the prerogative of imposing the death penalty, if that's what he ultimately feels is required in this case.

Thank you.

(R. 2439) (emphasis added) were anything other than inaccurate, misleading, improper, and false. Neither can the State explain how these comments did not diminish the jurors' sense of responsibility. Neither does the State even attempt to explain how judicial instructions such as

Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed on the Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory opinion.

(R. 2453-54), served to cure the harm caused by the prosecutor's statements rather than approving and compounding the error.

Finally, the State makes no effort whatsoever to explain why the errors herein at issue "had no effect on the sentencing decision . . ." Caldwell, 472 U.S. at 341. The State Petitioner can explain none of this, for Mr. Mann's case falls squarely within Caldwell.

2. The proceedings in Mr. Mann's case violated
Caldwell

After examining the record, Judge Tjoflat's opinion for the en banc Eleventh Circuit explained:

In reviewing Caldwell claims, our task is twofold. First, we must determine whether the prosecutor's comments to the jury were such that they would "minimize the jury's sense of responsibility for determining the appropriateness of death." Caldwell, 472 U.S. at 341, 105 S.Ct. at 2646. Second, if the comments would have such effect, we must determine "whether the trial judge in this

case sufficiently corrected the impression left by the prosecutor." McCorquodale v. Kemp, 829 F.2d 1035, 1037 (11th Cir. 1987).

When a trial court does not correct misleading comments as to the jury's sentencing role, the state has violated the defendant's eighth amendment rights because the court has given the state's imprimatur to those comments; the effect is the same as if the trial court had actually instructed the jury that the prosecutor's comments represented a correct statement of the law. See Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir.1986) (en banc), cert. denied, --- U.S. ---, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987). When a trial court does make some attempt to correct the prosecutor's misleading comments, the question becomes whether the corrective statement would, in the mind of a reasonable juror who had been exposed to the misleading comments, correct the misapprehension that the comments would induce. Because our focus is ultimately on the trial court's actions, our mode of review is similar to that used to review claims based on erroneous jury instructions. Cf. Lamb v. Jernigan, 683 F.2d 1332, 1339-40 (11th Cir.1982) (court must consider effect of erroneous instruction on reasonable juror "in light of the remainder of the charge and the entire trial"), cert. denied, 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983).

In this case, the comments by the prosecutor were such that they would mislead or at least confuse the jury as to the nature of its sentencing responsibility under Florida law. It bears emphasizing that the prosecutor in Caldwell stated only that the jury's verdict would be "automatically reviewable." Technically, this statement was an accurate statement of Mississippi law--death sentences are automatically reviewed by the Supreme Court of Mississippi under Miss.Code Ann Sec. 99-19-105. The mischief was that the statement, unexplained, would have likely been misunderstood by the jurors as meaning that their judgment call on the appropriateness of a death sentence did not really matter. We are faced with a similar situation here. The prosecutor repeatedly told the jury that its task was to render an "advisory" recommendation. As with "automatically reviewable" in Caldwell, this characterization is technically accurate, at least in the sense that the Florida death penalty statute contains the term "advisory." However, the danger exists that the jurors, because they were unaware of the body of law that requires the trial judge to give weight to the jury recommendation, were misinformed as to the importance of their judgment call. The danger is particularly strong here, because nothing in the common meaning of the term "advisory" would suggest to the layman

that the trial judge would in any way be bound by the recommendation; indeed, the common meaning of the term would suggest precisely the contrary.

Moreover, here the prosecutor stated to the jurors twice that the burden of imposing the death penalty was "not on your shoulders." He repeatedly told the jurors that the responsibility for imposing sentence rested with the trial judge. Additionally, we note that the prosecutor suggested to the jurors that the trial judge, because of his position as a legal authority, was more able than the jury to make the appropriate sentencing decision. As the Supreme Court noted in Caldwell, this kind of suggestion induces jurors, who are "placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice," to delegate wrongly their sentencing responsibility. Caldwell, 472 U.S. at 333, 105 S.Ct. at 2641-42. We conclude that the prosecutor's statements, considered together, misrepresent the nature of the jury's critical role under the Florida capital sentencing scheme. Such comments, if uncorrected, would undoubtedly minimize a juror's sense of responsibility, thus creating "a danger of bias in favor of the death penalty." Adams, 804 F.2d at 1532.

Turning to the second prong of our inquiry, we conclude that the trial judge's comments did not correct the false impression left by the prosecutor. The trial court specifically denied defense counsel's request that the jury be properly informed as to its role. Moreover, the judge himself stated that the final sentencing decision rested "solely with the judge of this court." The trial judge expressly put the court's imprimatur on the prosecutor's previous misleading statements by saying to the jurors that "[a]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge."

The only potentially corrective statement by the court came when the court instructed the jurors that they should proceed with "due regard to the gravity" of the matter and should "carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment." This statement, we conclude, did not cure the harm posed by the court's other actions. The statement would do little if anything to change a juror's misapprehension about the effect of the jury's decision; it only instructs the jurors that they should approach their task with care and deliberation. At best, it likely left some jurors confused as to their proper role. We therefore conclude that the court's actions,

as considered by a reasonable juror who had been exposed to the prosecutor's misleading comments, did not correct the false impression created by those comments. Cf. Caldwell, 472 U.S. at 340 n. 7, 105 S.Ct. at 2645 n. 7 (prosecutor's later statements did not retract or undermine the misimpression created by the earlier statements). Because the overall effect of the court's actions was to diminish the jury's sense of responsibility with regard to its sentencing role, petitioner's sentence is invalid under the eighth amendment.

Mann, 844 F.2d at 1456-58 (emphasis in original)(footnotes omitted).

As is more than plain, the Eleventh Circuit applied the appropriate eighth amendment analysis to Mr. Mann's claim -- the analysis established by this Court in Caldwell. The State Petitioner has failed to show why the Eleventh Circuit was wrong.

CONCLUSION

The en banc Eleventh Circuit's strict holding and ultimate determination in Mr. Mann's case is neither in conflict with this Court's precedents, nor with other federal courts of appeal, nor even with the Florida Supreme Court. The Eleventh Circuit's opinion in Mr. Mann's case procedurally and substantively is in conformity with this Court's well-settled precedents. The two cases now before this Court upon which the Petitioner relies, Dugger v. Adams; Harris v. Reed, are inapposite to Mr. Mann's and will not affect the Eleventh Circuit's ultimate disposition of this action. The Eleventh Circuit's sound en banc opinion should not be disturbed and the petition for writ of certiorari should be denied.

WHEREFORE, Respondent, LARRY EUGENE MANN, respectfully prays
that the Court deny Petitioner's Application for a Writ of
Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

NO. 87-2073 (3)

RICHARD L. DUGGER,

Petitioner,

v.

LARRY EUGENE MANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX
IN SUPPORT OF
RESPONDENT'S BRIEF IN OPPOSITION

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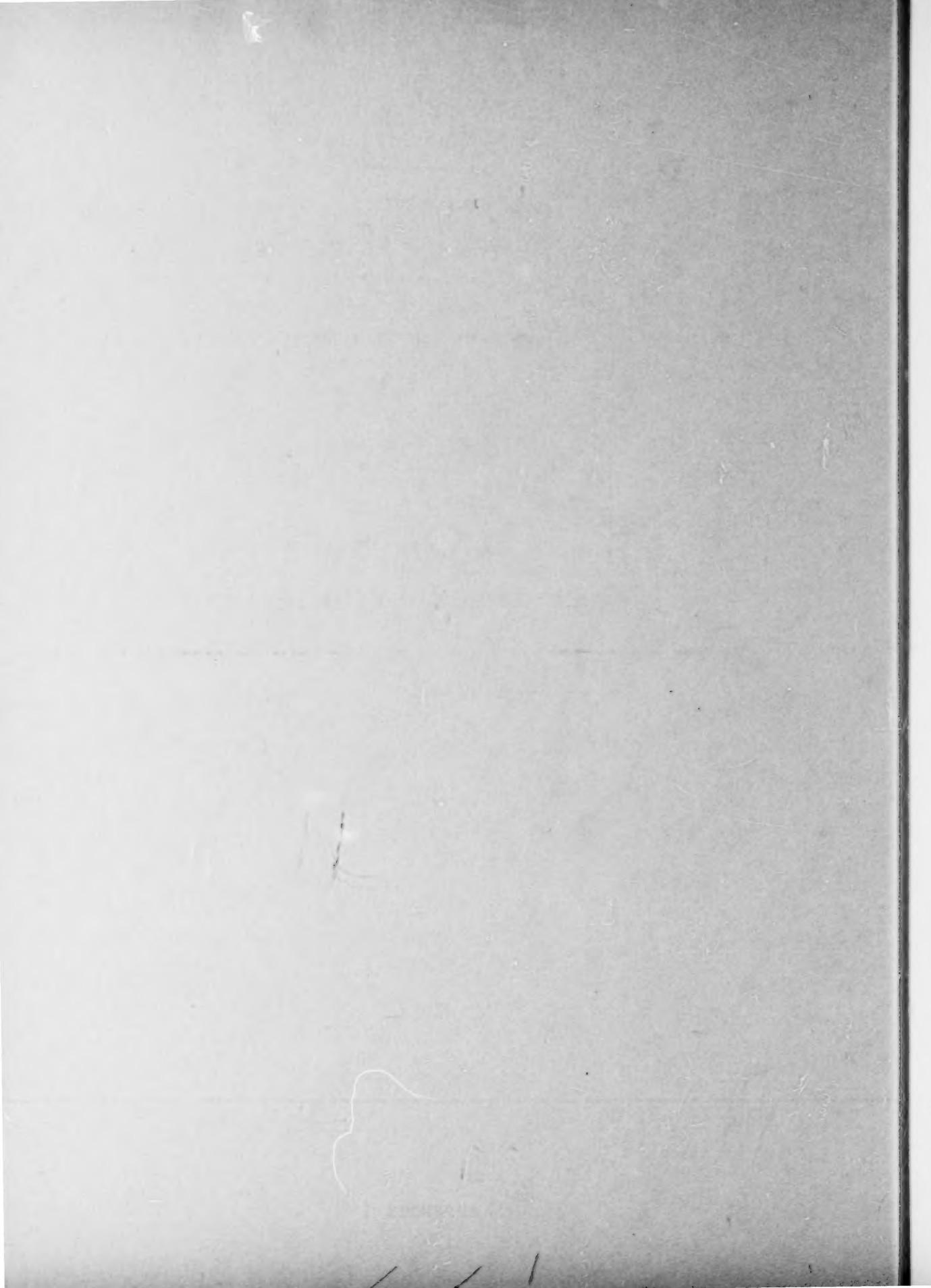
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1. 11th Circuit En Banc Initial Brief of Appellant, dated October 23, 1987.
2. Excerpts to 11th Circuit En Banc Initial Brief of Appellant, reflecting statements, comments and instructions made by prosecutor and trial judge in violation of Caldwell v. Mississippi.
3. 11th Circuit En Banc Reply Brief of Appellant, dated December 7, 1987



APPENDIX 1



IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Docket No. 86-3182

LARRY EUGENE MANN,
Petitioner-Appellant,
versus
RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

EN BANC INITIAL BRIEF OF APPELLANT

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Preference: Habeas Corpus, Rule 11, App. 1(a)(3), En Banc



CERTIFICATE OF INTERESTED PERSONS

The following have an interest in this appeal:

1. The petitioner-appellant, Larry Eugene Mann.
2. The respondent-appellee, Richard L. Dugger, Secretary, Florida Department of Corrections.
3. The Honorable Elizabeth A. Kovachevich, United States District Judge for the Middle District of Florida.
4. Present counsel for the petitioner: Talbot D'Alemberte.
5. Counsel for the respondent: Robert Butterworth, Attorney General of the State of Florida.

Talbot D'Alemberte
Talbot D'Alemberte
Attorney for Petitioner-Appellant



PRELIMINARY STATEMENT

References to the district court record follow the procedure authorized by the Court, i.e., "R (Vol. #) - (Doc. #) - (Page #)." References to the trial transcript and the record on appeal of Mr. Mann's trial in the Circuit Court for the Sixth Judicial Circuit, in and for Pinellas County, Florida, are cited "ROA - (Page #)." References to the transcript and record on appeal of the resentencing hearing are cited "RROA - (Page #)." References to the Supplemental Record, the Record on Appeal are cited "SR - (Doc. #) - (Page #)." References to the Appendix to the Petition for Writ of Habeas Corpus, RL-2, are cited "Pet. App. - (Volume #) - (Section #) (Page #, Attachment #) (Exhibit #)."

References to the Appendix to this brief appear as "A-#".

STATEMENT REGARDING PREFERENCE

This is an appeal from the denial of a petition for a writ of habeas corpus, pursuant to 28 U.S.C. sec. 2254, by the United States District Court for the Middle District of Florida. Preference in processing and disposition of this case is based upon Rule 11, Rules of the United States Court of Appeals for the Eleventh Circuit, Appendix 1(a)(3). This case has now been set for en banc argument before the Court.

REQUEST FOR ORAL ARGUMENT

This case has been set for en banc consideration, and Mr. Mann, through counsel, requests the opportunity to present oral argument.



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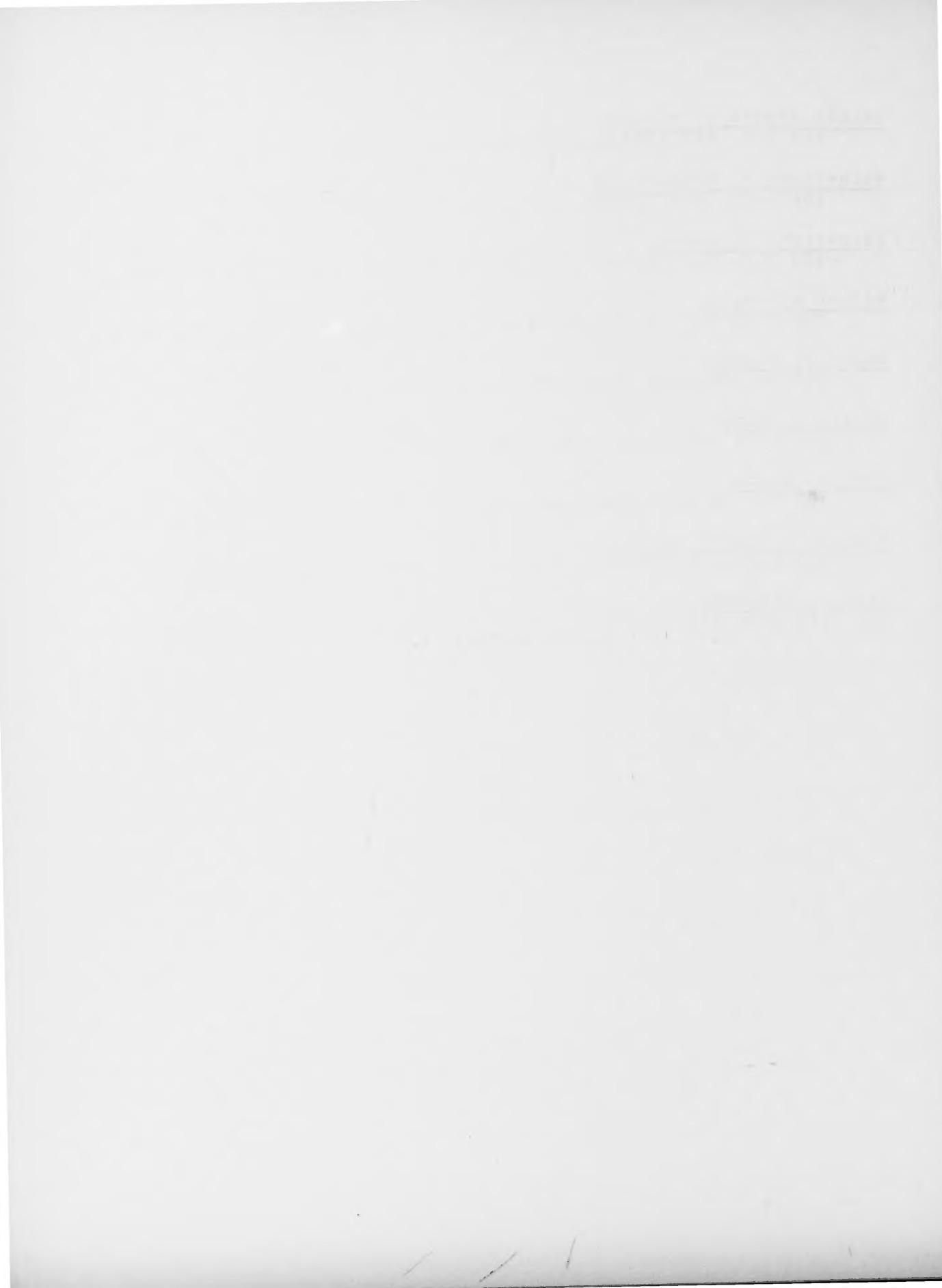
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STATEMENT OF THE ISSUES PRESENTED 1/

I. Whether systematic comments by the trial judge and prosecutor throughout the course of the proceedings resulting in Mr. Mann's sentence of death diminished the jurors' sense of responsibility for the capital sentencing task that they were to perform, in violation of Caldwell v. Mississippi and the eighth and fourteenth amendments?2/

II. Whether Mr. Mann's involuntary absence from a jury view conducted during the course of his capital trial at which important testimony was taken from the lead investigative detective violated the Confrontation Clause and the sixth, eighth, and fourteenth amendments?3/

1. The Court has set Mr. Mann's case for en banc consideration without limiting consideration to any specific issue. This is consistent with the practice in this Circuit of hearing all issues in an en banc case, without limiting consideration to the issue which may have prompted en banc review. E.g., Moore v. Kemp, 809 F.2d 702, 708-09 (11th Cir. 1987) (en banc); Hitchcock v. Wainwright, 770 F.2d 1514, 1516 (11th Cir. 1985) (en banc); Brooks v. Kemp, 762 F.2d 1383, 1387 (11th Cir. 1985) (en banc). Mr. Mann incorporates by reference each of the arguments and citations of authority presented in the briefs, supplemental authorities, and motion for rehearing previously presented to the panel. By referring the en banc Court to his earlier submissions, Mr. Mann presents those issues and arguments for the en banc Court's review.

This brief specifically discusses four issues--those which Mr. Mann believes will be of greatest interest to the en banc Court. Mr. Mann respectfully refers the court to his earlier submissions with regard to the other issues presented in this proceeding. Additionally, with respect to the issues discussed in this brief, Mr. Mann has not repeated each of the supporting arguments presented to the panel.

2. Presented as part of Issue III of the panel brief. Mr. Mann's presentation of this claim to the panel also included a due process and eighth amendment challenge to the gross prosecutorial misconduct which directly resulted in his capital conviction and sentence of death (Initial Brief, Issue III, pp. 37-40; Reply Brief, pp. 21-22). The panel denied relief on this aspect of Mr. Mann's claim. In this brief Mr. Mann will not specifically discuss aspects of the prosecutor's misconduct which do not directly relate to his Caldwell v. Mississippi claim. He urges, however, that the en banc court reconsider this issue and grant habeas corpus relief for the reasons presented in his petition for panel rehearing (p. 14).

3. Presented as Issue I of the panel brief.



III. Whether the death sentence imposed on Mr. Mann in substantial reliance on an unconstitutional prior conviction violates the eighth and fourteenth amendments?^{4/}

IV. Whether Mr. Mann's sentence of death violates Doyle v. Ohio and the fifth, sixth, eighth, and fourteenth amendments because it was based on a recommendation of death obtained from a jury which was told that Mr. Mann "showed" no remorse after a post-arrest, post-Miranda warnings invocation of his right to silence?^{5/}

V. Whether the failure of the court during the sentencing phase of the trial to give a requested jury instruction that the jury could properly consider absence of flight as a mitigating factor constitutes a violation of the eighth and fourteenth amendments?^{6/}

VI. Whether the failure of the jury form to indicate whether the conviction was based upon a finding of actual intent on a premeditation theory, or merely imputed intent on a felony murder theory, coupled with the failure of both the trial court and the appellate court to make a finding of actual intent, renders the sentence of death invalid under the eighth amendment?^{7/}

4. Presented as Issue IV of the panel brief.
5. Presented as Issue V of the panel brief.
6. Presented as Issue II of the panel brief. This issue is not detailed again herein. Mr. Mann respectfully refers the Court to his panel submissions in this regard.
7. Presented as Issue VI of the panel brief. This issue is not detailed again herein. Mr. Mann respectfully refers the Court to his panel submissions in this regard.



STATEMENT OF THE CASE 8/

I. FACTS RELATING TO THE TRIAL COURT'S AND PROSECUTOR'S DIMINISHING OF THE JURORS' SENSE OF RESPONSIBILITY

At all trials there are only a few occasions when jurors learn of their proper role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge about what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr. Mann's case, at each of those stages -- voir dire, closing arguments, judicial instructions -- the jurors received misleading information which diminished their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform.

1. Voir Dire: Prosecutor's Comments

Every prospective juror sat in the courtroom during the entire jury selection process, and every juror heard each remark made by the prosecutor and the judge.

8. Mr. Mann presented a factual and procedural statement in his initial panel brief. Here, he presents the facts most directly pertinent to his Caldwell v. Mississippi claim and to his claim that his involuntary absence from critical jury view proceedings during the course of his capital trial violated his sixth, eighth, and fourteenth amendment rights. The facts relating to the unconstitutionality of the Mississippi conviction used to sentence Mr. Mann to death are discussed in Mr. Mann's initial panel brief (Issue IV, pp. 40-64) and in his petition for a writ of habeas corpus. R., Vol. 1. The facts relating to the State's unconstitutional elicitation and use of Mr. Mann's post-conviction, post-Miranda warnings silence are discussed in the initial panel brief (Issue V, pp. 64-66), in Mr. Mann's petition for a writ of habeas corpus, R., Vol. 1, and in Mr. Mann's petition for panel rehearing (pp. 12-14).



go back and to deliberate that issue. Obviously, if the jury finds him to be innocent, they come back and say so, and he walks out of the courtroom and that's the end of that.

(ROA 1215).

But there is another phase, the prosecutor lectured the entire venire, where the rules of responsibility change. If the jury convicts:

[T]he jury then has the opportunity to go back and determine whether or not you will come back and make a recommendation of mercy to the Court.

The recommendation that you make to Judge Federico in this portion of the trial is simply a recommendation and he is not bound by it. He may impose whatever sentence the law permits. He will have been here and will have listened to all the testimony himself.

(ROA 1216) (emphasis added).

This concept of vastly different responsibility for the two phases of the trial became the central theme of the voir dire. The prosecutor:

Okay. Are we all now up to speed on where we're going? Do you understand that the first portion of the trial relates to guilty/not guilty? The second portion of the trial involves different evidence, different testimony, the possibility of that, in deeming whether you will recommend to the judge mercy in dealing with the Defendant? Does everybody understand that that's the procedure that will be followed in this case now?

(ROA 1217) (emphasis added).

In case the venire did not understand his use of the word "recommend" in this statement, the prosecutor immediately referred back to the dialogue he had with Dr. Lee, a short time (two transcript pages) earlier:

Do any of you have feelings, as Doctor Lee did, with regard to the imposition of the death penalty, that possibility?

(ROA 1218).



If there were those who felt that responsibility, the prosecutor immediately let them know that it was not their job. He told the venire:

You understand you do not impose the death penalty: that is not on your shoulders. The ultimate decision rests with Judge Federico.

(ROA 1218) (emphasis added).

The prosecutor hammered this theme over and over, throughout the voir dire:

Again, that decision rests up here with the law, with Judge Federico. You will have the opportunity after you have heard everything there is to make a recommendation to him.

(ROA 1218) (emphasis added).

The prosecutor quickly added his misleading explanation of the term "recommendation":

But it is not legally on your shoulders, though. It is not your ultimate decision. You act in that regard in an advisory capacity only.

(ROA 1218-19) (emphasis added).

This misleading definition of "advisory" and "recommendation" was repeated throughout the voir dire (E.g., ROA 1319 ["you can offer Judge Federico an advisory opinion as to what sentence you think he ought to consider imposing. . . ."]); ROA 1330 [the death penalty "is the judge's responsibility"]; ROA 1363 ["advisory opinion to the Court"].)

The prosecutor continuously returned to this idea:

[Y]ou do not impose the death penalty. It is authorized by the law in the State of Florida that the Court would impose it should you find the Defendant guilty and should he find it necessary and proper in this case. If not, the alternative is life imprisonment.

(ROA 1363) (emphasis added).



Later, the prosecutor made certain the jurors understood they had no responsibility for sentencing:

You both understand that the ultimate responsibility rests with the Court; that it's not the jury's responsibility?

(Thereupon, the prospective jurors indicated affirmatively.)

(ROA 1393) (emphasis added).

2. Guilt Phase: Prosecutor's Closing Argument"

We would not expect to encounter any reference to the jury's role in sentencing at the guilt/innocence stage, but we do find it in Mr. Mann's case. Indeed, we find that the prosecutor is so committed to conveying the idea that sentencing was for the judge, not the jury, that he emphasized it in the most important place available to him-- at the very close of his argument:

The State has done everything that it can do under the system up until this point. You go out, you deliberate your verdict, and you walk back into this courtroom and you tell the Defendant and you tell Judge Federico and you tell the world what you have determined. I submit that if you carefully consider all of the evidence in this case, you'll walk back in with a conviction of guilty as charged of murder in the first degree, guilty as charged of kidnapping. If you do that, we'll reconvene, as we talked about in voir dire. The matter of sentencing ultimately rests with the Court. But I ask you to consider the case carefully. When you come back into the courtroom, look at him, give him the justice that he demands of us. Give him the justice that he didn't give to Elisa Nelson. Thank you.

(ROA 2272-73) (emphasis added).

3. Guilt Phase: Judge's Instructions

The trial judge's instructions to the jury made very strong statements about the jurors' duty to "disregard the consequences of your verdict" (ROA 2329). The

instructions strongly suggested that, after the verdict, the jurors' real work was over:

When you have determined whether the Defendant is guilty or not guilty, you have completely fulfilled your solemn obligation under your oaths.

(ROA 2330).

4. Sentencing Phase: Closing Argument

In the prosecutor's penalty phase arguments he continued to use the term "recommendation" without ever attempting to give that term its accurate meaning -- without ever disclosing the fact that the jury's sentencing verdict was entitled to great deference (E.g., ROA 2457).

Earlier, the prosecutor made his statements diminishing the jury's role at the very end of his guilt phase closing argument (ROA 2272-73). The same prominence was given to this subject in the sentencing phase arguments and the prosecutor was even more direct^{9/}, adding an additional spin to the proposition that it was the judge who had the sole responsibility. His closing words to the jury were:

What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico.

That is his main position in this system.

He's heard everything you have heard.

He may have the opportunity to learn more before he imposes a sentence.

9. The prosecutor's penalty phase argument is a textbook example of gross prosecutorial misconduct. The prosecutor's inflammatory comments were directly related to his efforts to diminish the jury's sense of responsibility. Those comments are discussed in the body of Issue I, infra, at n.16. (The argument is reproduced in its entirety in the Appendix annexed to this brief.)



I think this community, as represented by this jury, should give to him the prerogative of imposing the death penalty, if that's what he ultimately feels is required in this case. Thank you.

(ROA 2439) (emphasis added and sentences separated for emphasis).

5. Sentencing Phase: Preliminary Instructions to the Jury.

The prosecutor's exhortations that the jury shift its sentencing responsibility ("not on your shoulders") to the higher authority -- the judge ("give to him") -- were not cured by any judicial instructions. To the contrary, the judge took the exhortations a step further. His instructions stamped them with the approval of the law.

When adjourning the case for the day after the jury returned its guilty verdict, the judge's first instructions regarding the jury's penalty phase function referred only to the jury's "advisory opinion to the Court" (ROA 2344) without giving any further explanation which would unload the baggage placed on this phrase by the prosecutor.

In fact, when the jury returned, the judge immediately returned to a theme popular with the prosecutor during the voir dire: "The final decision as to what punishment shall be imposed rests solely with the judge of this Court" (ROA 2361) (emphasis added).^{10/}

The judge's preliminary penalty phase instructions continued, compounding the theme which the prosecutor had established:

10. Earlier, the defense had sought an instruction on the weight which a jury's sentencing verdict was to be accorded under Florida law (ROA 363). The judge denied the instruction (ROA 2357).



The final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed on the Defendant.

(ROA 2361) (emphasis added).

6. Sentencing Phase: The Court's Final Instructions

Nothing in the court's final sentencing instructions corrected the impressions given at each possible earlier stage of the proceedings. The theme continued to be that the jurors' duty was of little relevance, that the jurors were only to "advise" the court (See, e.g., ROA 2457-59). No explanation of that term was provided to contradict the prosecutor's "not on your shoulders" gloss. Never did the judge or prosecutor tell the jury that their verdict would be accorded great [or any] weight. Rather, the court instructed the jury as follows:

Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed on the Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory opinion.

(ROA 2453-54).11/

11. Ironically, after the jury returned a recommendation of death and had physically left the courtroom, the judge announced what the jury was not told:

THE BAILIFF: The jury has left the courtroom.

THE COURT: The Court, as required by law, will give great weight to the recommendation of the jury. . . .

(ROA 2464).



II. FACTS RELATING TO MR. MANN'S INVOLUNTARY ABSENCE CLAIM

The trial court granted the prosecutor's motion for a jury view (ROA 378). The jury was then shepherded to various scenes relating to the alleged offense. Mr. Mann's counsel had previously objected to the jury viewings (ROA 1601; 1175). However, during an in-chambers conference at which Mr. Mann was not present, counsel informed the court that they would waive Mr. Mann's right to be present at the jury viewings (ROA 1174). Defense counsel understood the purpose of the jury viewings to be only to show locations and not to elicit any testimony (ROA 1604, 1609, 1175).

The affidavits proffered to the district court demonstrate that, while Mr. Mann agreed with counsel he did not think it necessary to be present at a "jury view," he did not in any manner waive his right to be present during the taking of testimony at such a jury view (Pet. App., Volume 1, sections 1 and 22). Trial counsel have stated in the affidavits accompanying the habeas petition that it was their understanding that no testimony would be taken while the jury was viewing the scene. They told Mr. Mann only that the jury would view the scene, and not that there would be testimony taken (Pet. App., Volume 1, section 1 and 2). This was Mr. Mann's understanding, as related to him by his counsel (Id.). It is evident in the record that the trial court assured counsel there would be no testimony taken. (Even if this were not clear, there are, at a minimum, questions which require an evidentiary hearing.) As the appendices to the habeas petition make clear, Mr. Mann never understood that he was waiving his right to be present at the taking of any testimony at the jury viewing. The record contains no express waiver of Mr. Mann's right to be present; there is only the bare statement of defense counsel, made in Mr. Mann's absence (in



chambers), which we now know was not relevant to the true issue.12/

During the in-chambers conference between counsel and the court, the court specifically noted that "the detective who will be testifying [at the crime scene] will simply point out the various areas and what that area pertains to and not give any further testimony of any kind" (ROA 1174) (emphasis added). The prosecutor qualified this specifically with the exception to location, to have the detective "point out where the tire plaster casts were made, the position of the body and that sort of thing."

The Court responded: "But no testimony beyond that" (ROA 1175) (emphasis added).

During the jury view, the prosecutor expanded the scope of the testimony taken to include testimony on various other matters extending far beyond his earlier explanation. Defense counsel objected, stating that the purpose of the view was to show the location and nothing further. The court allowed the questioning to continue (ROA 1604). After additional questioning, defense counsel again objected: "At this point, we would object as we previously objected, for eliciting testimony at the scene" (ROA 1609). The court overruled each of counsels' objection (ROA 1604, 1609, 1610).

12. Further, during this time, Mr. Mann was in no mental condition to waive any right at all. As the medical records in the Appendix to the Petition for Writ of Habeas Corpus reflect, at the time of the in-chambers conference, Mr. Mann was heavily medicated with sinequan and librium to such an extent that his thinking was confused and distorted, and he was unable to make any knowing and intelligent waiver. (Pet. App., Volume 1, section 3; see also, ROA 2380, 2384-85 [Testimony by expert that Mr. Mann was heavily medicated and sedated throughout his stay at the jail pending trial and that Mr. Mann during this time suffered from psychotic depression]; see also ROA 2425-26 [testimony by defense counsel at penalty phase concerning the fact that Mr. Mann was medicated during pendency of proceedings].) (Again, on this issue, at a minimum, an evidentiary hearing was required.)

At the "viewings" the jury was paraded through five locations relating to the offense. At each scene, more and more damaging testimony was elicited (going far beyond the scope of the prosecutor's initial statements to the court regarding the scope of the viewings). Counsel, at each scene, objected. Counsel at each of the five scenes, declined to cross-examine -- because they could not. Counsel could not cross-examine because Mr. Mann was not there to provide information or assist in developing questions.

The record of what transpired at the five scenes to which the jury was paraded is included in pages 1599-1613 of the transcript. The transcript shows the extensive testimony taken from the lead investigative detective. No amount of artful re-writing can mirror the substantial constitutional violation shown by the transcript itself. Those pages (1599-1613) are therefore fully reproduced in Appendix C to this brief.

The jurors, judge, prosecutor, defense attorneys, witnesses, court reporter, victim's family, newspaper reporters, bailiffs and other court personnel all went to these five scenes (ROA 1599-1613). Mr. Mann was left behind (ROA 1601, 1603). Innumerable questions were asked. They visited, inter alia, the location of the decedent's home (ROA 1601), the area where she had last been observed (ROA 1603), the area where the bicycle was discovered (ROA 1604), the area where the body was discovered (ROA 1605), and even Mr. Mann's home (ROA 1612). At these locations, the lead detective described the scenes, the extent of searches conducted, where evidence was left, the conditions at each scene and how those conditions had changed (ROA 1599-1613). The detective first testified about the location of "the home of the victim's parents and the home where the victim was living on November fourth, 1980"



(ROA 1602). Next, the detective testified at "the place where Mrs. Underwood explained to you was the last place she saw Elisa Nelson" (ROA 1603). At the next scene, the detective described the location of the bicycle, showed the photograph to the jury, described its position in the brush, identified a photograph of the bicycle, showed the photograph to the jury, and explained that the area had been heavily overgrown and was now cleared (ROA 1604-05).

At the scene where the body was located, the detective pointed out the hole where, according to his testimony, the decedent's head had been situated, indicating that the hole was now full of leaves, and described the position of her body (ROA 1605-06). The detective also identified photographs taken the day the body was discovered, described the contents of the photographs, and explained where the photographer was standing (ROA 1607-08). The detective then described the differences in the scene from the way it appeared on the day the body was discovered (ROA 1609), and described the areas searched by the police, how the search was conducted, how the overgrowth present at the time complicated the search, and the locations of items of evidence collected by the searchers (1610-12).

At the final scene, Mr. Mann's home, the detective pointed out the home, explained how the home and truck were searched on November 8th, and pointed out a neighbor's home across the street (ROA 1612-13).

Defense objections to the detective's testimony on the basis that defense counsel were unable to conduct proper cross-examination were overruled (ROA 1609). Defense counsel conducted no cross-examination at any of the five scenes (ROA 1599-1613). During closing argument, the state repeatedly referred to the fact that the jury had been to all of the locations involved in the crime (ROA 2239, 2240, 2241,



2243, 2249, 2252, 2253).

Pages 1599-1613 of the record make it abundantly clear that Mr. Mann was denied the most essential of rights -- the right to be present during, and to confront one's accusers, at one's trial. The chief investigative detective's testimony at these scenes was critical. Mr. Mann, involuntarily, was absent.

STANDARD OF REVIEW

This is a habeas corpus proceeding in which no evidentiary hearing has been held and in which Mr. Mann's claims have been summarily dismissed. The allegations in the Petition and the facts proffered in support thereof must therefore be taken as true for purposes of this appeal. Blackledge v. Allison, 431 U.S. 63 (1977). The issues presented in this appeal involve questions of federal constitutional law requiring independent review by this Court. Brewer v. Williams, 430 U.S. 387 (1977). This appeal also involves mixed questions of federal constitutional law and fact which require independent review. Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980).

This case has been set for en banc rehearing. Consistent with the common practice in the Circuit (see n.1, supra) the Court has not limited en banc review in this case. Mr. Mann's claims are therefore now before the full Court.

SUMMARY OF ARGUMENT

I. Mr. Mann was sentenced to death by a jury which was systematically misinformed by the prosecutor that the responsibility for the awesome capital sentencing that they were to perform was "not on [their] shoulders" and that they should shift their responsibility to the trial judge who would have special knowledge of information that was kept from them. The trial judge aggravated the pervasive harm caused by the prosecutor's comments, instructing the jurors throughout the

proceedings that the responsibility for sentencing was his and not their's. The comments came during the course of a trial involving grossly inflammatory prosecutorial exhortations that the jurors express unbridled "outrage" by sentencing Mr. Mann to death. The comments at issue were misleading, and were cured by no accurate instruction on the jury's proper role. Mr. Mann's death sentence is fundamentally unreliable and violative of the eighth and fourteenth amendments.

Caldwell v. Mississippi. Because the State cannot demonstrate that the comments issue had "no effect" at sentencing, and because (as each judge of this Circuit who has passed on a Caldwell claim has agreed) there is no procedural bar to a determination of the merits of Mr. Mann's claim, Mr. Mann is entitled to habeas corpus relief.

II. Mr. Mann was denied the most fundamental of all rights -- the right to be present during critical proceedings in his capital trial at which substantial testimony was elicited on the merits of the case against him. Mr. Mann never waived that right, and the State cannot show that there is no reasonable possibility that Mr. Mann's presence would have had some effect on the events at the jury viewings from which Mr. Mann was involuntarily absent. Mr. Mann was denied his rights under the confrontation clause and under the sixth, eighth and fourteenth amendments to the United States Constitution. His claim is barred by no adequate and independent state law ground and, at a minimum, he is entitled to an evidentiary hearing in the district court on the basis of the allegations presented in his federal habeas petition.

III. Mr. Mann's sentence of death is based on "misinformation of constitutional magnitude" for that sentence was obtained on the basis of an unconstitutional prior



conviction. However, the Florida courts refused to allow Mr. Mann to prove his claim at a hearing by imposing a procedural bar that had been employed against no other litigant in the Florida courts and of which Mr. Mann could not have been reasonably apprised. Mr. Mann is entitled to a hearing in the federal district court on this claim.

IV. The State presented testimony at the penalty phase that Mr. Mann showed "no remorse" during his post-arrest, post-Miranda warnings, custody. Mr. Mann showed "no remorse" because he was exercising his right to remain silent. However, the "no remorse" evidence presented to the jury was used to rebut Mr. Mann's case in mitigation and to aggravate sentence, and was coupled with other improper prosecutorial comments in the prosecutor's exhortations that the jury recommend death. Such procedures violate Doyle v. Ohio, Wainwright v. Greenfield, and the fifth, sixth, eighth, and fourteenth amendments. No adequate and independent state law ground bars federal review of Mr. Mann's claim and, at a minimum, Mr. Mann is entitled to a district court hearing on this issue.

STATEMENT OF JURISDICTION

The statement of jurisdiction appearing at page 10 of Mr. Mann's initial panel brief is incorporated herein.



ARGUMENT

I.

SYSTEMATIC COMMENTS BY THE TRIAL JUDGE AND PROSECUTOR
THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN MR.
MANN'S SENTENCE OF DEATH DIMINISHED THE JURORS' SENSE OF
RESPONSIBILITY FOR THE CAPITAL SENTENCING TASK THAT THEY
WERE TO PERFORM IN VIOLATION CALDWELL V. MISSISSIPPI AND THE
EIGHTH AND FOURTEENTH AMENDMENTS .

- A. PROSPECTIVE JURORS ENTER THE PROCESS IGNORANT OF THEIR ROLE AND DEPENDENT UPON PROPER INSTRUCTIONS.

The genius of the jury system enables us to employ lay persons unacquainted with legal processes in an essential factfinding role. For jurors to properly perform their job it is essential that they be accurately informed of their role.

Jurors are drawn from their ordinary pursuits into a venire. If selected, they are placed in an environment where every aspect of their surroundings suggests deference to the judge. The judge is specially clad in a black robe, elevated by the architecture of the courtroom, and elevated also by the conventions and protocol of our normal practice. There is a natural and proper tendency for the jurors to defer to the judge.

To grasp the essence of the central issue before the court, it is useful to mentally take the place of the lay person summoned from ordinary pursuits into this extraordinary setting, isolated from fellow citizens, dwelling in a domain where the judge has control. Jurors summoned and selected in capital cases will feel special pressure. The law ascribes for them an important role. Yet, they are ignorant of that role.

They do not know what lies in the realm of the jury and what responsibility rests with the judge. Jurors are told that they are to receive instructions on the



law from the judge. Under these circumstances, lay persons will probably listen closely as the lawyers and the judge tell about the jurors' job.

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2641-42 (1985). When we understand these factors, we can appreciate the powerful facts of this case.

B. THE JURORS WERE TOLD BY PROSECUTOR AND JUDGE THAT THEIR ROLE IN SENTENCING WAS NOT SIGNIFICANT.

Mr. Mann's Statement of the Case presented a detailed factual account of the numerous misleading statements provided by both the prosecutor and judge to his capital jury regarding the sentencing task that the law required them to perform. Throughout the proceedings the prosecutor told the jurors that their role at sentencing was essentially irrelevant, that their sentencing verdict was merely "advisory," that the sentencing decision was not on their "shoulders," and that the judge, who would hear more evidence, would decide the critical central question in this case: should Larry Mann live or die. As in Caldwell, the trial judge "not only failed to correct the prosecutor's remarks, but in fact openly agreed with them," 105 S. Ct. at 2645, by instructing the jury that their sentencing determination was in fact merely "advisory" and that responsibility for sentencing was his and his alone.



Not once did the judge or prosecutor inform the jurors of their proper role:^{12/} that their sentencing determination was a far cry from unimportant.^{13/}

The prosecutor's misleading and inaccurate^{14/} theme did not cease when members of the jury were selected. In closing argument, the jurors heard an extraordinary statement from the prosecutor who apparently felt the need to isolate the jury from responsibility by again misinforming them of their proper role but also suggesting the superior knowledge of the judge. He said:

12. Defense counsel, during voir dire, made one passing reference to the fact that the judge would give "great weight" to the jury's sentencing "recommendation." This isolated comment was by no means sufficient to undo the harm caused by the pervasive statements from the prosecutor and judge that the jury's "recommendation" was of little significance and that the sentencing task was not on their "shoulders." The Caldwell Court refuted the suggestion that even the prosecutor's own later statements "that the jury played an important role in the sentencing process" undid the harm caused by his earlier remark. 105 S. Ct. at 2645 n.7. The Court explained that "even if the prosecutor's later comments did leave the jury with [the] view that they had an important role to play, the prosecutor did not retract, or even undermine, his previous insistence that the jury's determination of the appropriateness of death would be reviewed by the appellate court to assure its correctness." Caldwell, 105 S. Ct. at 2645 n.7. That analysis applies with even stronger force to Mr. Mann's case. Here there was but a sole accurate reference to the jury's responsibility made by defense counsel at voir dire. Obviously, that passing reference was by no means sufficient to "retract" or "undermine" the persistent misleading and inaccurate statements of the prosecutor and the judge.

13. The "jury's role in an advisory sentencing process [in Florida] is critical." Adams v. Wainwright, 764 F.2d 1356, 1365 (11th Cir. 1985), cert. denied, 106 S. Ct. 834 (1986).

14. There can be little doubt that the statements at issue were misleading and inaccurate -- the jurors were told that their sentencing decision was of little [if any] importance while never being informed that that determination was "critical," Adams, 764 F.2d at 1356, or that the court would be bound by a verdict of life unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).



What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico. ... He's heard everything you have. He may have an opportunity to learn more before he imposes sentence.

(ROA 2439) (emphasis added).

The prosecutor's theme that jurors were not being dealt a full hand came up in the penalty phase argument in a statement which the panel decision found to be improper but insufficient to support a prosecutorial misconduct claim as an independent ground for reversal. The prosecutor stated:

We did not show you everything that was available. We can only show you those items that were permitted into evidence, those items which were found to be more relevant than inflammatory.

(ROA 2430-31).

What is the purpose of this? One obvious explanation is that it is an attempt to signal the jury that the judge has special knowledge -- he knows things which cannot be told to the jurors, and he will learn more about things the jurors will never know. This "special knowledge of the judge" argument^{15/} is tailored to support the frequently repeated "not on your shoulders" refrain.^{16/}

15. These statements "created a severe danger that [the jurors] would defer to such an expert legal judgment [of the judge] in their choice of penalty." Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985) (en banc).

16. The prosecutor's statements should not be read in isolation. They were part of an overall effort to exhort a jury whose sense of responsibility had been systematically diminished into expressing their "outrage" on the basis of wholly improper factors: "This community cannot afford for this man to remain alive" (ROA 2435); "What we don't know, if this man is ever eligible for parole, is who the victim will be in 26 years possibly" (ROA 2430) [emphasis supplied]; "You sat through this entire trial . . . How would you describe him during the course of what can only

[footnote continued on next page]

The judge might have been able to correct the prosecutor's statements at the time they were made or in his instructions.^{17/} He did neither and, in fact, he denied a requested defense instruction which would have at least accurately stated the role of the jury (ROA 2357). Instead, the judge provided instructions which told the jury that the prosecutor was right. Cf. Caldwell, 105 S. Ct. at 2645. The judge emphasized the important role that he [the judge] played, while informing the jury

16. [continued from previous page]

be described as emotionally heartrending testimony...? Did his expression change? Was he moved by emotion at all? Or did he appear to be cold and calculated? You look at him, and he shows no emotion at all..." (ROA 2271) [Mr. Mann was sedated during trial]; "There are other victims in this case, the parents of Elisa Vera Nelson who have never had the opportunity to stand in front of anyone and ask to have their daughter's life spared" (ROA 2439). These comments are but a few examples from a record as replete with prosecutorial misconduct as any can be. (For the Court's convenience, the penalty phase argument is reproduced in the Appendix to this brief.) Such comments (see also Initial [Panel] Brief of Appellant, pp. 37-40), when placed in the context of the prosecutor's Caldwell statements, show an even more egregious abrogation of the eighth and fourteenth amendments than that found to warrant relief in Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985), and Drake v. Kemp, supra, 762 F.2d 1449.

17. Compare the action of the trial judge in the case of McCorquodale v. Kemp, No. 87-8724 (11th Cir., September 20, 1987). There the Court explained that the eighth amendment had not been violated because proper and clear curative instructions were given. The McCorquodale trial judge began those instructions by stating that the prosecutor's argument was "highly improper." In contrast, the trial judge here enhanced and compounded the error.



that their role was of little significance.^{18/}

In short, the jurors were told repeatedly that their role in sentencing was not significant. They received this misleading message over and over again, at each stage of the trial. They heard it from the prosecutor and from the judge. The special status of the judge was reinforced by the prosecutor's improper arguments that there were things not shown to the jurors and that the judge would get more information before he sentenced the defendant.

18. Moreover, the sentencing instructions to the jury did not inform the jury of the impact of a verdict (and sentence) of life. Although there was, in the guilt/innocence phase, a passing reference to the maximum punishment for first degree murder (ROA 2313), this was not instructed on at the penalty phase where it related directly to the matter before the jury. The Florida Standard Jury Instructions now in force suggest that the trial judge refer to the alternative of "life imprisonment without the possibility of parole for 25 years" at the beginning of the penalty proceedings (see Florida Standard Jury Instructions in Criminal Cases, p. 77) and at the end of the penalty phase (id. at p. 80). In addition, the verdict form should carry the words "sentence of life imprisonment without possibility of parole for 25 years" (Id. at p. 82).

The trial judge did not give the jury the full explanation of the options at either of the two critical stages of the penalty phase, and the significant words which would remind the jury of the twenty-five year mandatory sentence were omitted from the jury verdict form.

As a consequence of this failure to adequately instruct on the alternative to a sentence of death, the danger of jury bias in favor of the death penalty was substantially enhanced. Cf. Beck v. Alabama, 447 U.S. 625 (1980). This also was an "error in instruction which makes it less likely that the jury will recommend a life sentence. . . ." Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985). Considered in the context of Mr. Mann's Caldwell claim, this error also "generated a bias toward returning a death sentence. . . ." 105 S. Ct. at 2642.



C. THE PROCEEDINGS IN MR. MANN'S CASE VIOLATED CALDWELL V. MISSISSIPPI.

The gravamen of Mr. Mann's claim is based on the fact that the prosecutor and the judge substantially misled and misinformed the jury as to its proper role and function at sentencing. Under Florida's capital sentencing statute, the jury has the primary responsibility for sentencing. Although the jury's sentencing verdict is sometimes referred to as "advisory" or as a "recommendation," the jury's role at the sentencing phase of a capital trial is critical. See Adams v. Wainwright, 764 F.2d at 1365; Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Dubois v. State, ___ So. 2d ___ (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, No. 68,341 (Fla. September 3, 1987). Thus, any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law.^{19/}

19. In fact, the judge's role is to serve as "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976); see also Adams v. Wainwright, 804 So. 2d 1526 (11th Cir. 1986). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. McCormick v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Adams, 804 F.2d at 1529. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So.2d at 910.



Both the prosecutor and judge led Mr. Mann's jury to believe that the judge was the sentencer, and that he was free to impose whatever sentence he wished, regardless of the jury's decision. At no point were the jurors correctly instructed as to Florida law-- they were never told that their sentencing decision was entitled to great weight, to extreme deference, or that in fact judge overrides of a jury's recommendation are seldom affirmed by the Florida Supreme Court.

In Caldwell, 105 S.Ct. 2633 (1985), the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. The prosecutor in Caldwell had argued that the jury's decision would be automatically reviewable by the Mississippi Supreme Court. However, because the prosecutor failed to also point out that the jury's decision would be viewed with a presumption of correctness, the Caldwell Court held that the jury was erroneously led to believe that the ultimate responsibility for the death sentence lay elsewhere. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S.Ct. at 2645, quoting Woodson v. North Carolina, 428 U.S. 290, 305 (1976).

The constitutional vice of the misinformation condemned by the Caldwell Court is



not only the substantial unreliability it injects into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. *Id.* at 2640.

A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that, its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S.Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S.Ct. at 2641-42. As the Caldwell Court explained:

In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 2641-42. In Mr. Mann's case, given the emotional nature of the offense, and especially considering the Caldwell statements alongside the prosecutor's inflammatory exhortations (see n.16, supra), the evil condemned in Caldwell is even more apparent.

As in Caldwell the prosecutor's remarks in Mr. Mann's case "were quite focused, unambiguous, and strong." 105 S. Ct. at 2645. But the prosecutor's comments here went a step further -- they were much more systematic than those in Caldwell. Moreover, the prosecutor's efforts to diminish the jury's sense of responsibility in Mr. Mann's case were given the imprimatur of the court through its instructions. Cf. Caldwell, 105 S. Ct. at 2645 ("The trial judge in this case not only failed to correct the prosecutor's remarks, but in fact openly agreed with them..."); McCorquodale v. Kemp, supra, slip op. at 7. Here, in fact, the trial judge himself presented the jury with inaccurate information -- the error is thus even more egregious than that in Caldwell:

[B]ecause . . . the trial judge . . . made the misleading statements in this case, representing them to be an accurate description of the jury's responsibility, the jury was even more likely to have believed that its recommended sentence would have no effect and to have minimized its role than the jury in Caldwell.

Adams v. Wainwright, 804 F.2d 1526, 1531 (11th Cir. 1986).

Caldwell teaches that, given comments such as those provided by the judge and prosecutor to Mr. Mann's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. The State simply cannot carry that burden here. In Mr. Mann's case, a substantial case in mitigation was presented. Moreover, mitigating factors were found by the sentencing



court. Mr. Mann's case thus falls "within the area of deference to the jury's recommended sentence which makes the need for reliability in that recommended sentence of critical importance." Adams, 804 F.2d at 1533. Put another way, had the jurors not been misinformed, and had they recommended life, that recommendation could not have been overridden, for a "reasonable basis" for such a life recommendation existed in this case. See, e.g., Ferry v. State, supra. Mr. Mann's sentence of death therefore "does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, 105 S. Ct. at 2646.

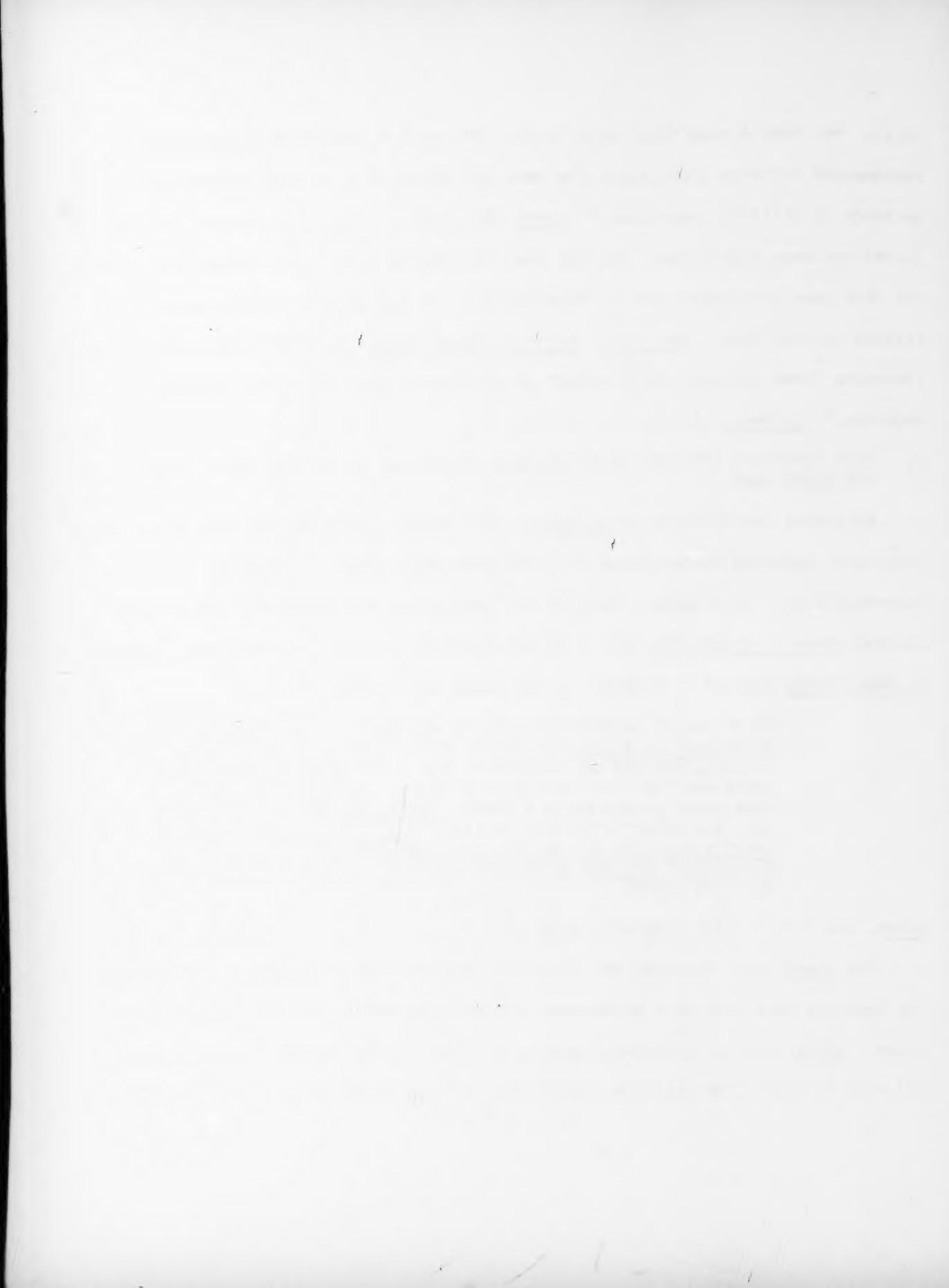
D. THIS CIRCUIT'S APPLICATION OF CALDWELL PRINCIPLES TO FLORIDA DEATH CASES:
THE ADAMS CASE.

Following the decision in Caldwell, this Circuit addressed the case of a Florida jury which received instructions which may have diminished its sense of responsibility. In November, 1986, Chief Judge Roney and Judges Fay and Johnson decided Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), and held that Caldwell v. Mississippi applied to Florida capital cases for, in Florida,

[T]he jury's recommendation...is entitled to great weight. McCampbell v. State, 421 So.2nd 1072, 1075 (Fla. 1982) (per curiam), and may be rejected by the trial judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (per curiam). This limitation on the judge's exercise of the jury override provides a "crucial protection" for the defendant. Doboert v. Florida, 432 U.S. 282, 295 (1977).

Adams, 804 F.2d at 1529 (emphasis supplied).

The Adams panel examined the facts and compared them to Caldwell. In Caldwell the comments were made by a prosecutor in closing argument, and endorsed by the judge. Adams involved statements made by a judge in jury selection. E.g., Adams, 804 F.2d at 1528 ("The ultimate responsibility . . . is not on your shoulders").



Adams held that the judge's statements violated Caldwell. Adams, 804 F.2d at 1529.

The Adams statements have direct parallels in Mann v. Dugger. Both the Adams and Mann juries were told that:

- * the jury verdict was just a recommendation,
- * that the judge was not bound by their recommendation,
- * that the decision was not on the jurors' "shoulders," and
- * that the jurors' role was merely advisory (the Adams jurors were told they were "merely" advisory; the Mann jurors were told that they acted in "an advisory capacity only.");
- * moreover, no curative instructions were given in either Adams or Mann.

These parallels between Adams--the settled law of the Circuit--and Mann are so striking that the argument could well be ended here.

E. AN ELEVENTH CIRCUIT PANEL DRAWS THE LINE: THE HARICH DECISION.

After Adams, this Court's next Caldwell case was Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), which is also before the Court for en banc briefing and argument. In Harich, the panel (Fay, Johnson and Clark) held that a statement by the prosecutor and certain statements by the trial judge did not mislead the jury. During voir dire, the prosecutor stated that in the sentencing phase the "court pronounces whatever sentence it sees fit". The trial court then made statements at guilt/innocence to the effect that sentencing was the judge's job. E.g., Harich, 813 F.2d at 1099 ("the penalty is for the court to decide. You are not responsible for the penalty in any way because of your verdict...").

The Harich panel concluded that the statements at issue did not create the



"intolerable danger" that an advisory jury was allowed to minimize its proper role and that the "seriousness of the jury's advisory role was adequately communicated. ..." Harich, 913 F.2d at 1101.

F. A SUGGESTED ANALYTIC FRAMEWORK.

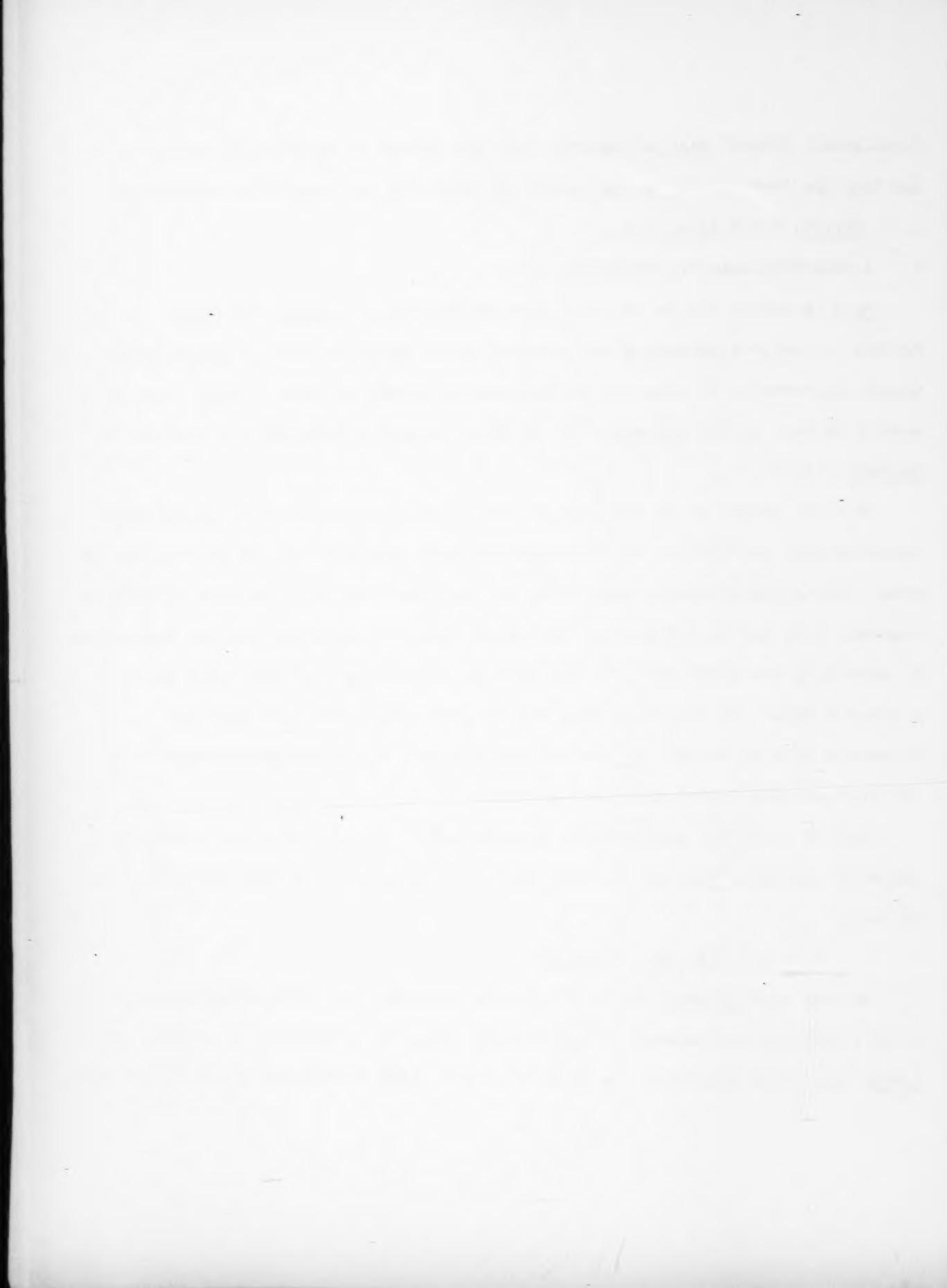
Mann is safely inside the principles established in Caldwell and Adams. We go further in analysis because we are bothered by the panel decision in Harich where, though the comments at issue are nowhere near as strong as those in Mann, they still seem to go well beyond Caldwell. We therefore suggest a framework for analysis of Caldwell claims.

We first return to the dynamics of the venire--the reality of a lay person's confusion when arriving at the courthouse to learn that s/he will serve on a capital case. Our analysis looks to that juror and the likelihood that the juror's sense of responsibility may be diminished. We suggest that the Court sort through these cases by addressing six questions: (1) Who made the statements? (2) When were the statements made? (3) How often were the statements repeated? (4) Were the statements true or false? (5) What is the substance of the statements made? (6) What curative instructions were given?

Each of these six approaches is examined below. We will show that under any method of analysis, Mann has far more compelling Caldwell facts than any other case to date.

1. Who made the statements?

We know from Caldwell that a diminishing statement only from the prosecutor (with a judicial endorsement) is a sufficient basis for constitutional attack. In Adams, this Court noted that the power of a trial judge to mislead a jury may be even



greater. 804 F.2d at 1532. In Mr. Mann's case, both judge and prosecutor persistently made statements which undermined jury responsibility.

Further, in Mr. Mann's case, the judge refused to give the jury a requested instruction (ROA 363) which would have helped correct the misleading statements.

2. When were the statements made?

In Caldwell, the jury heard the offending statement only in one episode at closing argument. In Adams, the offending statements were made throughout voir dire. In Mr. Mann's case, the theme of the jury's diminished role in sentencing began at voir dire and was drummed in over and over again at each stage of the trial.

The litany persisted from voir dire into the guilt/innocence phase and then into all steps of the sentencing phase. From the time the judge announced that the jury would go on to sentencing -- in his preliminary penalty phase instructions -- through the prosecutor's final argument and into final sentencing instructions, the jurors were told that they had no real responsibility for sentencing. That responsibility rested not on their "shoulders" but with the judge, who would "learn" more.

Significantly, in this case, the prosecutor began with the idea of the jurors' diminished role very early in the voir dire. More significantly, he returned to this topic at the places where lawyers normally place their most important points -- the end of his closing arguments at both guilt/innocence and sentencing.

3. How often were the statements repeated?

In Caldwell, there was a single episode. In this case, it is actually very hard to count the number of times that the prosecutor and judge made statements which diminished the jurors' responsibility for their sentencing task. Part of the time the prosecutor built up the jurors' role at guilt/innocence ("No one second guesses



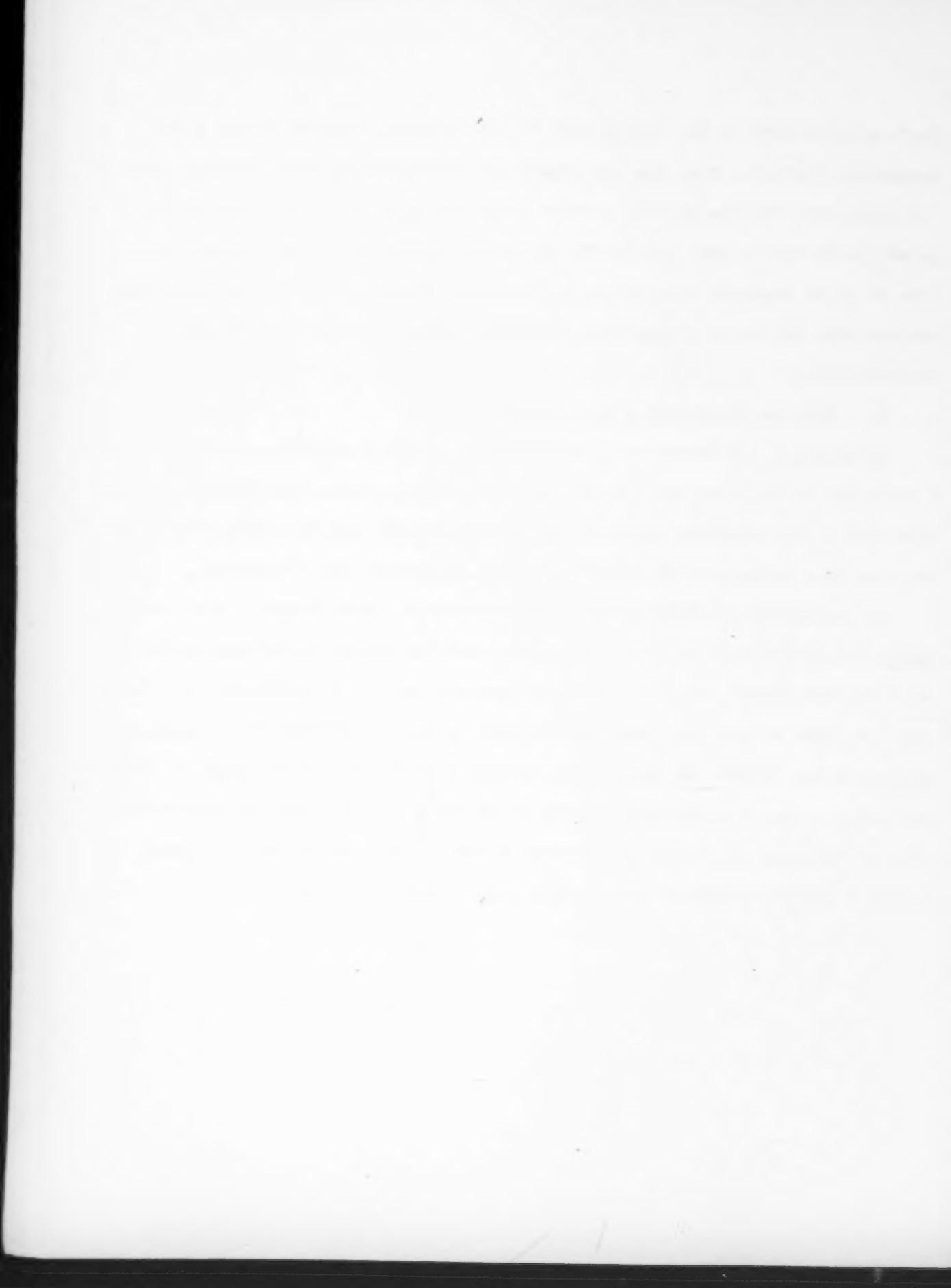
you") as a contrast to the "not on your shoulders" theme relating to the jurors' sentencing function. Even when the prosecutor used seemingly nonprovocative terms -- "advisory" and "recommendation" -- those terms were significantly tainted by the prosecutor's "not on your shoulders" definition. A reading of the Statement of the Case or of the excerpts from the trial transcript appended to this brief undeniably demonstrates the highly repetitious, systematic nature of these comments and instructions.

"

4. Were the statements true or false?

In Caldwell, the prosecutor's references to automatic appellate review were, in a technical sense, true, but they did not tell the full story. The Caldwell jurors were told of the automatic appellate review but were not told that their verdict was entitled to a presumption of correctness. The statements were misleading.

If statements are false, there is obviously even greater danger. Here, as in Adams, the jurors were told, multiple times, that the sentencing decision rested not on their "shoulders". At other times, it was made clear that sentencing was "solely" with the judge or that the judge was not bound by the "recommendation." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1976), settled Florida law. Under Tedder, a judge may reject a jury's recommendation only if the facts are "so clear and convincing that virtually no reasonable person could differ." The chasm between the Tedder standard and the statements made to this jury is shockingly wide.



5. What is the substance of the statements made?^{20/}

Our analysis of the substance of the statements compares the statements made in Caldwell, Adams, Harich and Mann and looks at two major types of statements: First, statements which indicate that the jury has only a limited or diminished role in sentencing. Second, statements which tell the jury that the court's role is paramount. In this case, there is a third category, closely related to the second, consisting of statements which tell the jury that the judge has special knowledge. These categories of substantive statements are reviewed below.

a. Statements which indicate that the jury only has a limited role.

In order to develop some understanding of this type of statement we place the statements in a hierarchy ranging from the least damaging to the most damaging:

- * Jurors told that their decision is "advisory" or that their verdict is a "recommendation";
- * Jurors told that jury role is "solely" or "merely" advisory;
- * Jurors told that sentencing is not a jury decision or that responsibility is not theirs;
- * Jurors told that the decision for sentencing is not on jurors' "shoulders".

As discussed below, cases which merit reversal will have some of those statements. In Mann, the statements made by the prosecutor and judge range through

20. This element of analysis is obviously the most critical. If the statements are not of the type that diminish the jury's responsibility, they may be made by an authoritative figure, repeated often at every stage of the trial and even be false without raising a Caldwell claim.



the hierarchy. Moreover, the Mann case is a special case because, even when the prosecutor told the jury that its role in sentencing was to give an "advisory opinion" or "recommendation," he immediately provided a distinct content to those words by sounding the "not on your shoulders" theme.

b. Comments which convey the dominance of the judge's position.

In this hierarchy are comments which tell the jury to defer to judicial authority. This is a somewhat indirect but extremely powerful way to diminish jurors' sense of responsibility. This analysis moves from those comments which seem to have least impact to those which have greater impact:

- * Decision on sentence will be automatically reviewed;
- * Final decision is with the judge;
- * Responsibility is with the judge;
- * Court is not bound by jury verdict on sentencing;
- * Judge can disregard jury verdict;
- * Decision on sentence rests solely on judge.

A third type of very powerful comment, present in Mann, is that the judge has special knowledge or special access to knowledge. A hierarchy there might be as follows:

- * At the sentencing phase, prosecutors argue:

We can show you only those items permitted into evidence, those items which were found to be more relevant than inflammatory.

- * At the sentencing phase, prosecutors argue:

The judge has heard everything you have. He may have an opportunity to learn more before he imposes sentence.



6. What curative instructions were given?

We need not linger on this question. There were no curative instructions in Mr. Mann's case. Cf. McCorquodale v. Kemp, supra.

G. APPLYING THE ANALYSIS TO THE FACTS OF THE CASES.

If these methods of analysis appear reasonable based on the tendency of the various statements to lessen the jurors' sense of responsibility, then we can use these to place the significant cases into some comprehensible order. For purposes of economy, we now deal with Caldwell, Adams, Harich and Mann. We return to the six questions, and attempt to weigh the cases:

1. Who made the statements?

Prosecutor: Caldwell.

Judge: Adams.

Prosecutor and Judge: Harich and Mann.

2. When were statements made?

Voir Dire: Mann, Adams, Harich.

Guilt/Innocence Phase, Instructions: Harich and Mann.

Guilt/Innocence Closing Arguments: Mann.

Sentencing Phase, Closing Argument: Mann and Caldwell.

Sentencing Phase, Preliminary Instructions: Mann and Harich.

Sentencing Phase, Final Instructions: Mann and Harich.

Turning this around to look at the stages of each case where statements were made, we see that, from this analytical view, Caldwell and Adams present less offensive factual patterns than Mann or even Harich:

28 (197)

Caldwell: Closing argument.

Adams: Voir dire.

Harich: Voir dire, instructions at the guilt/innocence phase, preliminary instructions at sentencing phase, final instructions at sentencing phase.

Mann: Voir dire, guilt/innocence phase instructions, guilt/innocence phase closing argument, sentencing phase closing argument, sentencing phase preliminary instructions, sentencing phase final instructions.

The offensive statements were pervasive in the trial of Larry Mann.

A more graphic way of looking at the first two methods of analysis (who made the statements and when were they made) is offered in the following chart:

COMPARISON OF FACTS:
ELEVENTH CIRCUIT CASES INVOLVING CALDWELL CLAIMS21/

<u>Stages of the Trial</u>	<u>Caldwell</u>	<u>Adams</u>	<u>Harich</u>	<u>Mann</u>
Preliminary: Voir Dire		:	P	P
Guilt/Innocence: Closing Argument				P
Final instructions			J	J
Penalty Phase:				
Closing Argument	P			P
Preliminary Instructions		J	J	J
Final Instructions		J	J	J

3. How often were such statements made?

In Caldwell, there was a single point repeated within a few minutes: "Your job is reviewable." 105 S.Ct. at 2637, 2638.

In Adams, the judge said, eleven times at voir dire, "the ultimate responsibility for what this man gets is not on your shoulders. It's on my shoulders. You are merely an advisory group to me in Phase Two." 804 F.2d at 1523.

21. Legend: P = Prosecutor's comments where the court does not give curative instruction. J = Comments or instruction by the judge.

8

In Harich, the prosecutor made a single statement at voir dire, the judge made "several similar statements during the guilt/innocence phase," and there were statements made by the judge at both the beginning and end of the penalty phase. 813 F.2d at 1098-99.

In Mann, the prosecutor made multiple statements at voir dire, an offensive comment at the end of his guilt/innocence argument, and returned to the theme in the very last passage of his sentencing phase closing argument. Diminishing the statements were included in the judge's guilt/innocence instructions, the judge's preliminary instructions in the penalty phase, and the final instructions in the penalty phase.

If we analyze the stages of the case where there are statements diminishing the jurors' role occur, it is clear that the facts of Mann go further than any other case yet before this Court, and significantly, go very far beyond the conduct found improper in Caldwell.

4. Were the statements true or false?

Virtually all the comments made in Caldwell, Adams, Harich and Mann are misleading to one degree or another.^{22/} Therefore, we turn to the final method of analysis which is the suggested hierarchy of substantive statements.

5. What statements were made?

Earlier, we suggested two hierarchies and have ranked the statements from those we believe to be least misleading to those most misleading. We now repeat those hierarchies and attempt to match the cases to them:

22. It is also important to remember that the Caldwell statements in Mr. Mann's case came in the context of grossly improper and inflammatory prosecutorial arguments. See n.16, supra.



A.

STATEMENTS CONCERNING ROLE OF THE JURY IN SENTENCING

	<u>Caldwell</u>	<u>Adams</u>	<u>Harich</u>	<u>Mann</u>
--	-----------------	--------------	---------------	-------------

- | | | | | |
|--|---|---|---|---|
| A. Jurors told that their decision is "advisory" or that their verdict is a "recommendation"; | | X | X | |
| B. Jurors told that their verdict is "simply a recommendation" or that jury role is "solely" or "merely" advisory; | | | | X |
| C. Jurors told that sentencing is not a jury decision; or that they are not responsible; or that they do not "impose" the death penalty; | X | X | X | |
| D. Jurors told that the decision for sentencing is not on their "conscience" or is not on their "shoulders". | X | | | X |

Note that there are no comments or instructions of this type in Caldwell.

Again, the facts in Larry Mann's case show comments ranging from the least offensive to the most offensive and, quite often, the prosecutor in the Mann case attempted to put a heavily prejudicial definition on even the least offensive phrases.

Chart B lists those statements relating to judicial roles, statements which emphasize the responsibility of others and which at least indirectly diminish the jurors' sense of responsibility:



B.

STATEMENTS CONCERNING THE ROLE OF THE COURTS IN SENTENCING

	<u>Caldwell</u>	<u>Adams</u>	<u>Harich</u>	<u>Mann</u>
A. Decision on sentence will be automatically reviewed.	X			
B. Final or "ultimate" decision is with the judge; final decision "solely" with the judge.		X	X	
C. Responsibility is with the judge.	X	X	X	
D. Judge has special knowledge.				X
E. Judge may learn something jurors will not know before sentencing.	X			X
F. Court is not bound by jury verdict on sentencing; court pronounces whatever sentence it sees fit; judge can disregard jury verdict.	X	X	X	
G. Decision on sentence rests solely on judge's "shoulders".	X			X

If our analysis is correct, the facts of Caldwell are less offensive than those of the other cases.

What is not apparent in any of these charts is the extent to which the jury diminishing comments pervade the Mann record. Particularly difficult to place on these charts is the point already made but important enough to deserve repetition:



The prosecutor started very early at voir dire with the "not on your shoulders" theme and carried it through at every non evidentiary phase of the trial. The placement at the end of both his jury arguments demonstrates the extent to which this idea of diminishment was a critical theme.

6. Were curative instructions given?

In none of the four cases were curative instructions given. In Mr. Mann's case not only did the judge fail to cure the harm, but his instructions enhanced it.

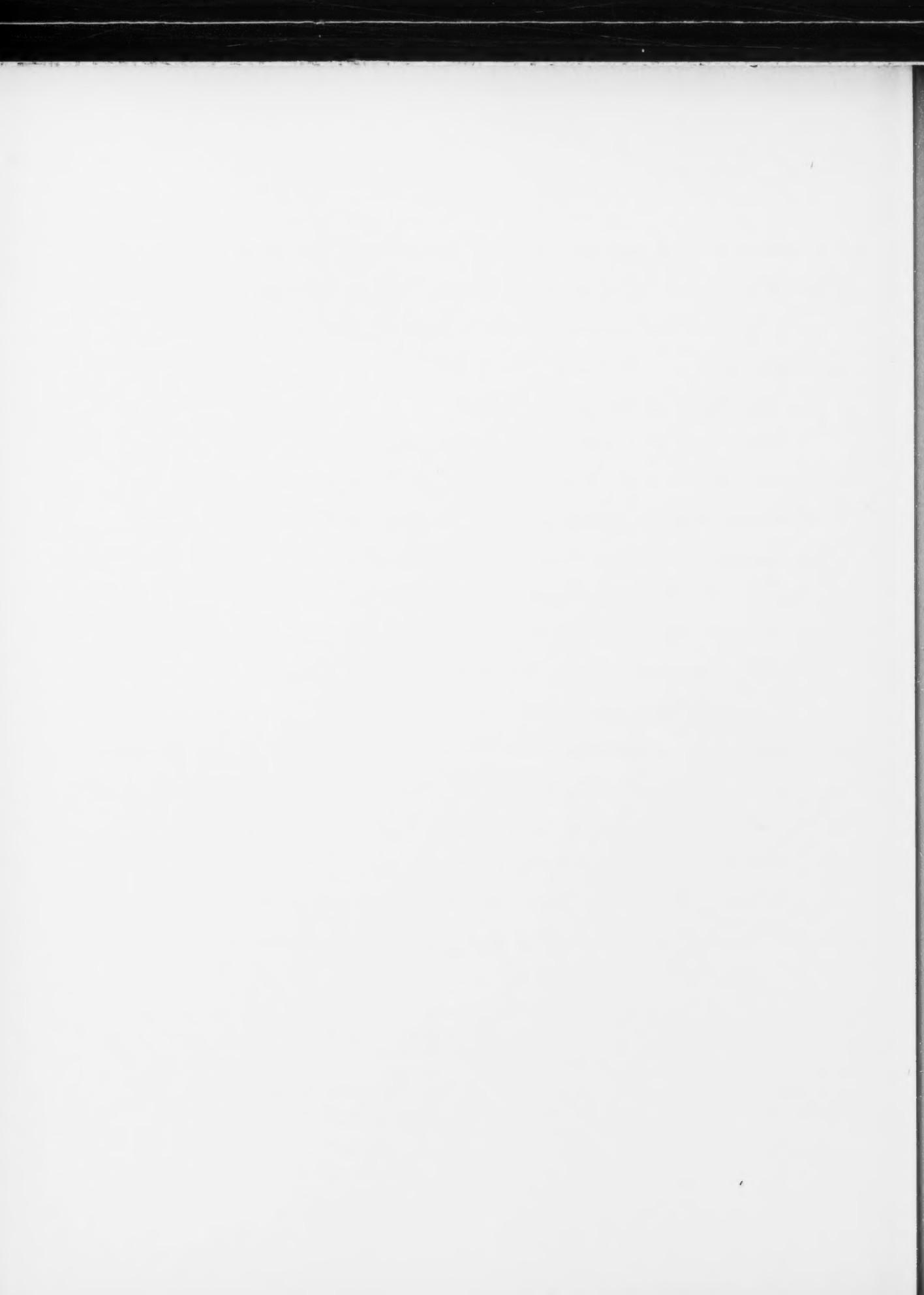
H. MR. MANN'S CALDWELL v. MISSISSIPPI CLAIM IS NOT PROCEDURALLY BARRED.

The discussion presented above demonstrates that Mr. Mann is entitled to habeas corpus relief. The Respondent, however, has argued that Mr. Mann's claim should not be heard by asserting that the claim is procedurally barred. However, no procedural bar precludes consideration of the merits of Mr. Mann's claim.

1. Cause and Prejudice

No adequate and independent state procedural ground exists barring this federal court's review of Mr. Mann's claim. See Section 2, infra.^{23/} However, even if such a bar existed, ample "cause" and "prejudice" is obvious in this case. It is black letter habeas law that the novelty of a federal constitutional claim whose legal basis could not have reasonably been known to a petitioner in the state courts is sufficient to establish "cause." See Reed v. Ross, 463 U.S. 1, 6 (1984). Caldwell

23. It would be redundant to restate here all of the reasons why Mr. Mann's claim is obviously before the Court on the merits. The grounds discussed with regard to other issues presented in latter portions of this brief apply with equal force to Mr. Mann's Caldwell claim. In the interests of brevity, those grounds, as well as the reasons discussed in Mr. Mann's initial and reply briefs, and in the panel opinion, 817 F.2d 1471, are not detailed, although incorporated, herein.



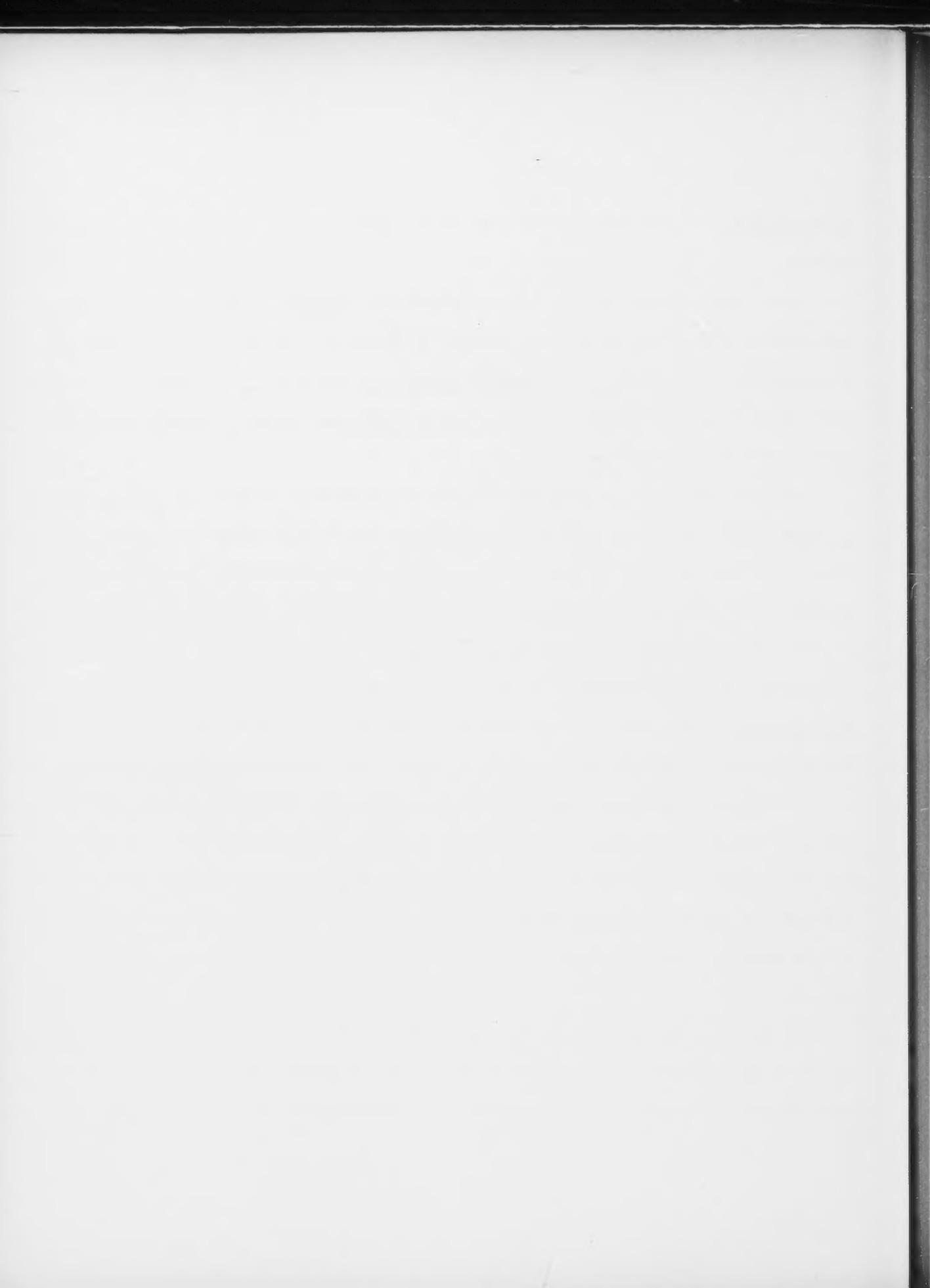
v. Mississippi did not exist at the time of Mr. Mann's trial, sentencing and direct appeals.

Every judge of this circuit who has passed on a Caldwell claim has recognized the claim's novelty and agreed that federal review is not barred by the doctrine of procedural default. See, e.g., Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) (Roney, Fay and Johnson), modified in part sub. nom. Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987). "

The panel decision in this case was before Judges Fay, Johnson and Clark. Mann v. Dugger, 817 F.2d 1471, 1474 (11th Cir. 1987) (opinion of Johnson, J.); id. at 1487 (Clark, J., concurring); id. at 1485 (Fay, J., dissenting) ("[T]his claim is not procedurally barred because Caldwell was decided after Mann's second direct appeal. . ."). That same panel addressed Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), and, on the procedural default issue, reached the same result. In McCorquodale v. Kemp, No. 87-8724 (11th Cir., September 20, 1987), an entirely different panel (Godbold, Kravitch and Hatchett) also recognized Caldwell's novelty.

This Circuit has recognized that "no one was raising [Caldwell claims]" during the period of Mr. Mann's direct appeals. Adams v. Dugger, 816 F.2d at 1500. The claim was not "reasonably available" prior to Caldwell. Adams at 1500. "[T]he state of the case law prior to Caldwell gave no indication that [statements diminishing the jury's sense of responsibility] might violate the Eighth Amendment." McCorquodale, slip op. at 4.

Accordingly, Caldwell's novelty amply demonstrates "cause." The "prejudice" to Mr. Mann was substantial -- as is demonstrated by the discussion in the preceding sections of this brief -- for the misleading statements made to the jury at Mr.



Mann's sentencing resulted in a sentencing decision that "does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, 105 S. Ct. at 2646.

2. The lack of an adequate and independent state law ground in this case makes the procedural default doctrine inapplicable.

If, under state law, no procedural bar is available, then no procedural default can be imposed by the federal court. See Spencer v. Kemp, 781 F.2d 1458, 1463 (11th Cir. 1986) (en banc). Moreover, the sporadic or inconsistent application of procedural bars itself defeats any adequacy and independence that may be ascribed to such rules. Spencer, supra, at 1470; Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985). Each of those reasons is sufficient to show that in Mr. Mann's case no adequate and independent state law procedural ground exists to bar this Court's review.

As this Court explained in Adams v. Dugger, Caldwell meets all of the criteria established in Witt v. State, 387 So. 2d 922, 929 (Fla.), cert. denied, 449 U.S. 1067 (1980), as sufficient to mandate merits review of the claim in a Florida post-conviction forum. Caldwell "emanated" from the United States Supreme Court. See Witt, supra, 387 So.2d at 929. Caldwell involved the most "fundamental" of eighth amendment concerns: that a defendant not be sentenced to die at a "substantially unreliable" proceeding because of "state-induced suggestions that the sentencing jury may shift its sense of responsibility." Caldwell, 105 S.Ct. at 2640. Obviously, Caldwell's fundamental eighth amendment concerns demonstrate that the Caldwell decision is retroactive. See Witt, 387 So.2d at 929. This Circuit has applied it retroactively. Adams, supra

Similarly, Caldwell claims are classic examples of issues which must be determined on the merits pursuant to Florida's "fundamental error" analysis, as this



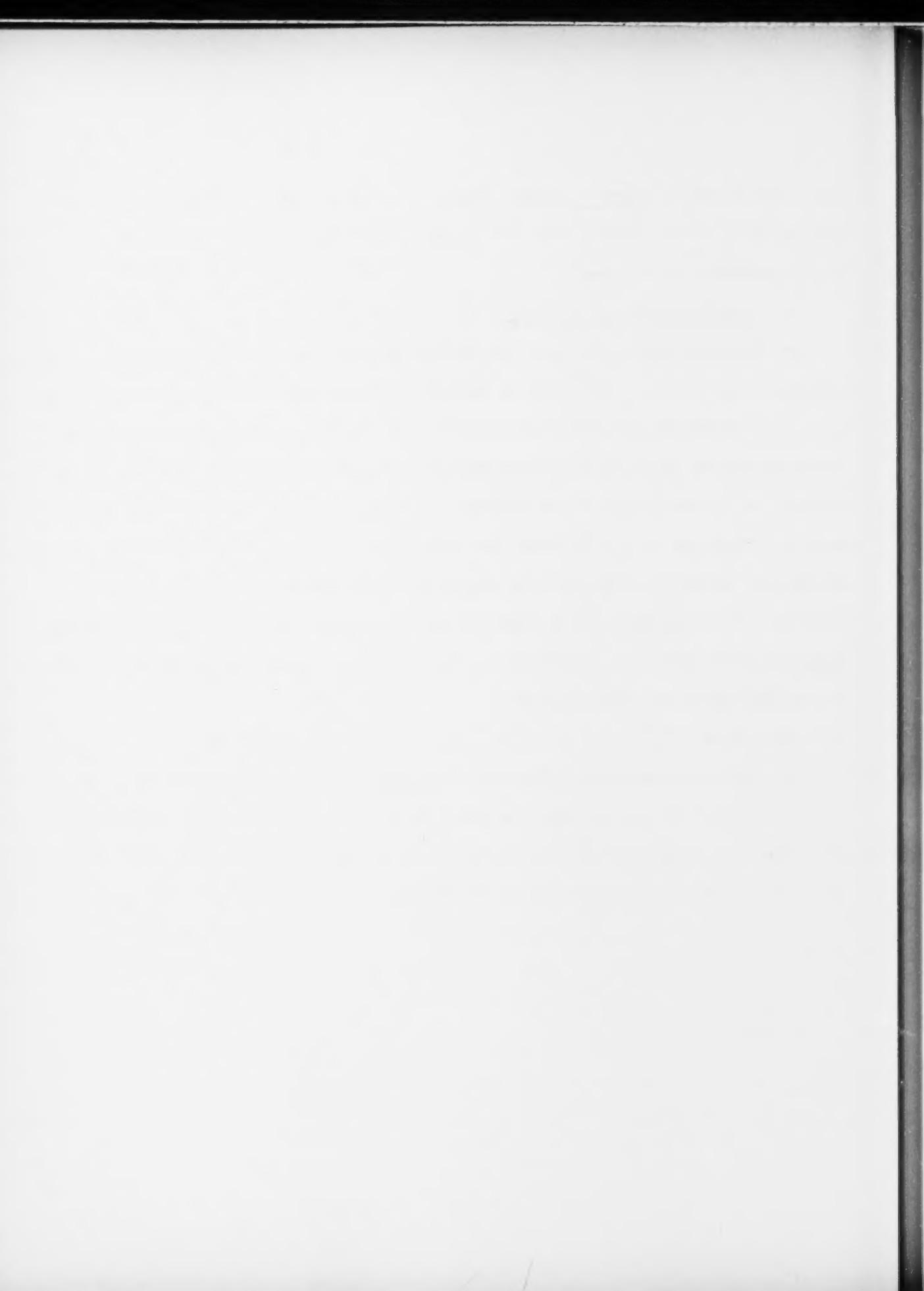
Court recognized in Adams v. Dugger, supra, 816 F.2d at 1497. The Adams analysis applies fully to Mr. Mann's claim for Caldwell involves the most fundamental of eighth amendment principles.

3. The interests of justice.

As discussed above, Mr. Mann was denied the most basic eighth amendment constitutional right -- the right to an individualized sentencing determination. The jury which sentenced Mr. Mann was misled and misinformed. The jurors likely based their sentencing decision on factors having nothing to do with the character of the offender or circumstances of the offense. On that basis, Mr. Mann has been sentenced to die. There can be little doubt that the prosecutor's and trial court's misleading statements "serve[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [Larry Mann should be sentenced to die]." Smith v. Murray, supra, at 2668 (emphasis in original). Given such circumstances, no procedural bar can be applied to Mr. Mann's claim.

I. CONCLUSION

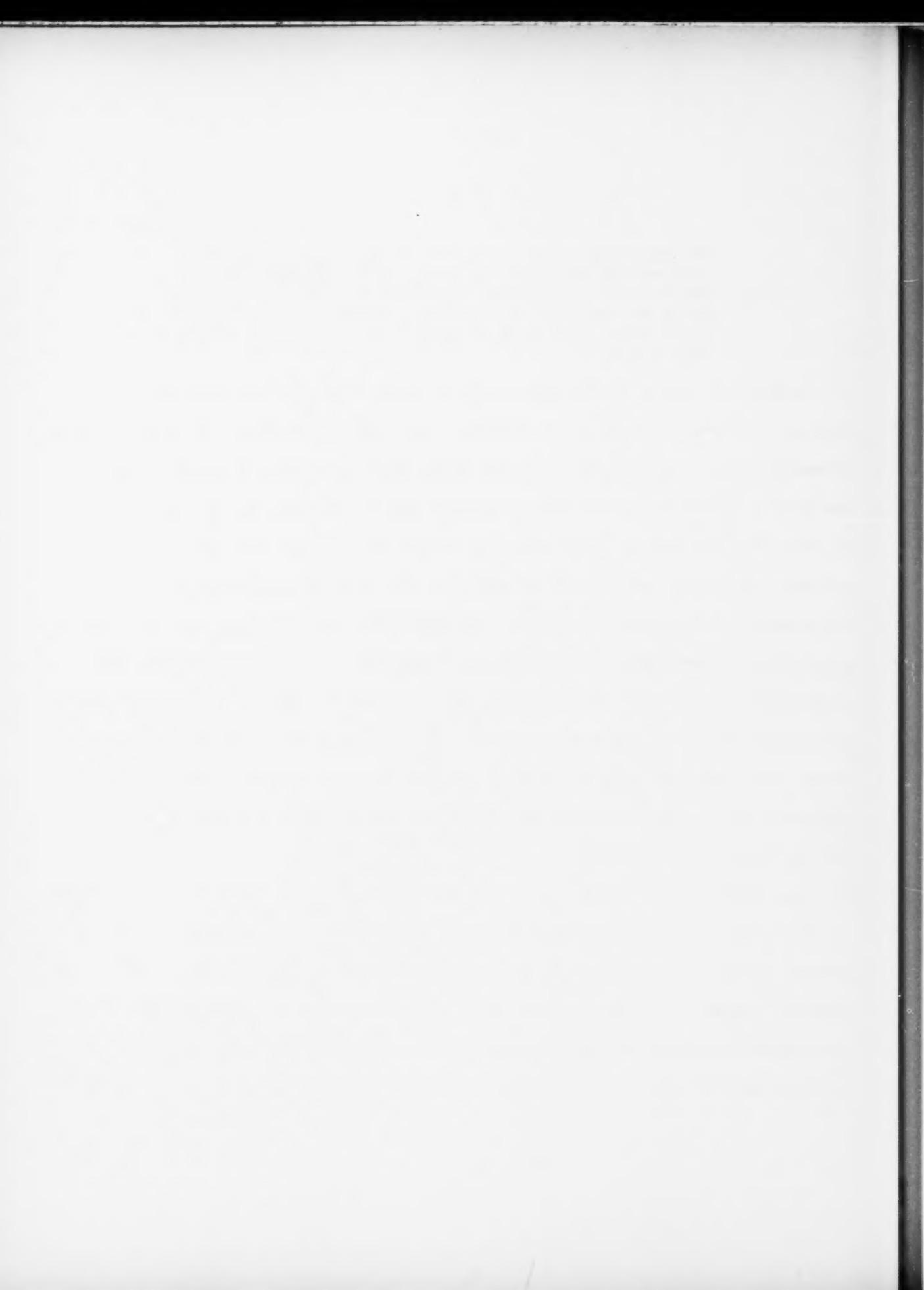
Mr. Mann has presented a substantial Caldwell v. Mississippi claim which is before the Court on the merits. The State cannot show that the Caldwell errors in this case had "no effect" on the jury's sentencing determination. Mr. Mann is entitled to the habeas corpus relief he seeks.



MR. MANN WAS DENIED HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN THE TRIAL COURT CONDUCTED CRITICAL PROCEEDINGS AND ALLOWED IMPORTANT TESTIMONY TO BE TAKEN WHILE MR. MANN WAS INVOLUNTARILY ABSENT, AND THE DISTRICT COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING ON THIS CLAIM.

During the course of Mr. Mann's capital trial, the jury was shepherded to various locations relating to the offense. The judge, prosecutor, defense attorneys, witnesses, court reporter, bailiffs and other court personnel, newspaper reporters, spectators, victim's family, and, of course, the jurors, were all at these scenes. Mr. Mann was left behind. Testimony was taken. Photographs were shown to the jury and described. The lead detective described the locations, the evidence, and law enforcement's investigative efforts. The detective then gave his views on, inter alia, where evidence was left, how it was found, the accounts of witnesses, the conditions at the scene, how the conditions had changed, and how he and other law enforcement personnel invested great efforts into "combing" the scene for evidence. These "jury viewings" were the core of the State's case, as the prosecutor's repeated reminders during summation made clear (ROA 2239, 2240, 2241, 2243, 2249, 2252, 253). But Mr. Mann was not there.

Mr. Mann will not repeat herein all the reasons why the "jury view" proceedings in this case were flatly unconstitutional. Those grounds are detailed in his Initial [Panel] Brief (pp. 11-18) and in his petition for panel rehearing (pp. 1-12). It is, however, indisputable that contrary to principles which are at the very core of the confrontation clause, Mr. Mann was not present when substantial testimony was elicited against him. This was inexcusable: Mr. Mann was not disruptive; he never

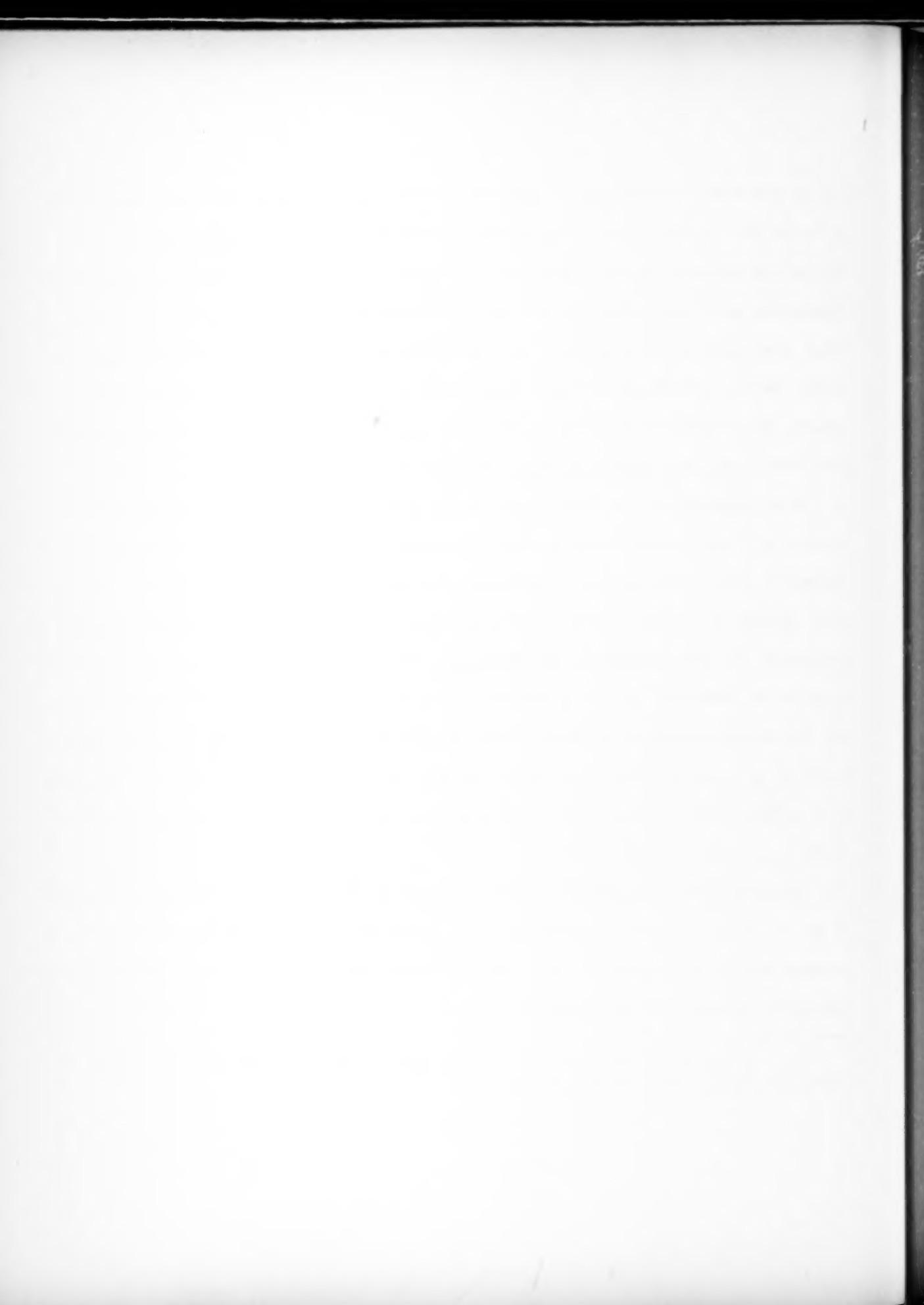


waived his right to presence in open court; his attorneys never informed him that he would be waiving his right to be present during the taking of testimony (the affidavits appended to the habeas petition make this undeniably clear); the attorneys themselves were then misled by the court's assertions that no testimony would be taken when they waived his right to presence at an in-chambers conference conducted in Mr. Mann's absence.^{24/} To the extent that there exists any question on these issues, an evidentiary hearing is required. Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984); see also Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983).

What happened at the view was a far cry from what the court represented to counsel and what counsel told Mr. Mann. Extensive testimony was elicited, over counsel's objections, regarding numerous aspects of the case. Nevertheless, the panel denied relief by relying on the due process harmless error analysis of a pre-incorporation case, Snyder v. Massachusetts, 291 U.S. 7 (1934), which had nothing to do with the essential values protected by the sixth amendment's confrontation clause and the eighth amendment's concerns for heightened reliability. See Mann v. Dugger, 817 F.2d 1471, 1476 (11th Cir. 1987). Snyder, in fact, did not involve the testimony of a witness (the prosecutor there pointed out the scene) during a critical stage of trial.

Here, Mr. Mann was denied the most central of constitutional rights -- the right to be at his trial. It is, after all, the defendant's right to suggest whether a witness should be examined or not, what questions should be asked, what defenses should be explored and developed.

24. At the time, Mr. Mann was heavily sedated and medicated and would have been unable to form a valid waiver of any right.



Moreover, a petitioner is entitled to habeas relief if there is "any reasonable possibility" of prejudice resulting from his absence. Proffitt v. Wainwright, 685 F.2d 1227, 1260 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983); Estes v. United States, 335 F.2d 609, 618 (5th Cir. 1964). The panel failed to see that the record of the testimony taken at the five locations to which the jury was shepherded (ROA 1600-13) showed exactly such a possibility. That record is rife with objections and statements from defense counsel indicating to the court that they could not fairly cross-examine the witness. As the group travelled to each location, more damaging and critical testimony was elicited. Counsel, at each point, declined to cross-examine -- they could not because their client was not there to provide information or assist in developing questions.²⁵

It must be remembered that the theory of defense at guilt-innocence was that a reasonable doubt existed because law enforcement did not properly investigate the case. Thus, in court, counsel challenged the State's "scientific" evidence as well as the inadequate investigation of the "lead" detective who testified at the jury viewings. His testimony was central. He should have been cross-examined at the scene, as was Mr. Mann's right. Without the needed information from the absent defendant, the detective's account was left unassailed.

25. The attorneys, like Mr. Mann, had been misled. The court had indicated earlier that no testimony would be taken (ROA 1175). Thus, counsel were placed in an untenable position -- they did not consult with Mr. Mann ahead of time because they believed testimony would not be taken at the "viewings" [cf. Appendices 1 and 2 to Petition for Writ of Habeas Corpus (affidavits of former counsel)], and they did not have Mr. Mann to consult with once it became obvious that testimony was being elicited.



This case, therefore, is in all pertinent respects no different than Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified, 706 F.2d 311 (1983). There, the defendant was involuntarily absent from a hearing held after the jury had rendered its advisory sentence at which a doctor presented testimony concerning psychiatric reports that had been presented to the court. 685 F.2d at 1256-59. The State argued that Proffitt's absence was harmless. This Court, however, refused to "engage in speculation as to the possibility that [Proffitt's] presence would have made a difference." Proffitt, 685 F.2d at 1260, citing Davis v. Alaska, 415 U.S. 308, 317 (1974). Rather, the court explained that because Proffitt could have provided information to counsel which could have been used to impeach the doctor, the defendant's absence could not be deemed harmless even though it had never been shown that the information would have changed the doctor's opinion. Proffitt, 685 F.2d at 1260-61.

Similarly, here, Mr. Mann could have provided information to counsel respecting the scene, its condition at the time of the offense, his home, the alleged location of physical evidence, the alleged "changes", and the other matters testified to by the detective which could have been used to challenge and impeach that witness's testimony.^{26/} Mr. Mann could suggest nothing to counsel, and counsel could not consult

26. Had Mr. Mann been there, had counsel been able to consult with their client, the attorneys could well have cross-examined the detective when it counted. They could have challenged his recollection; they could have challenged his description of the alleged changes in the scene; they could have challenged his version of the events. Through the information that Mr. Mann could have provided, numerous questions could have been posed concerning the eyeglasses, the pole, the bicycle, the dirt road, the decedent's body, the "thick brush," the bushes, the "head in the hole," the tire tracks, the "galvanized pipe," the "concrete," County Road 39, [footnote continued on next page]



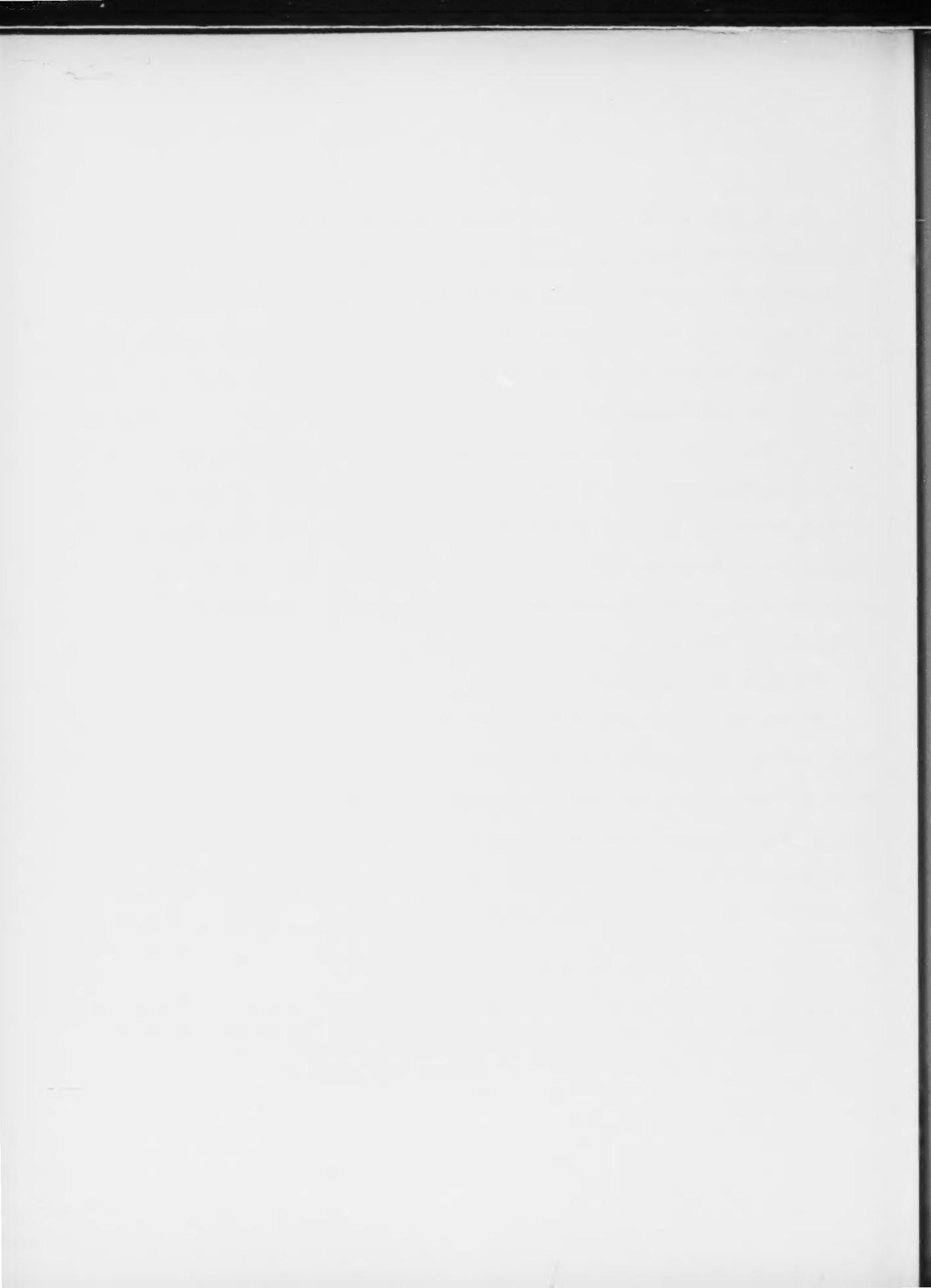
with him, because he was not there. (Counsel obviously did not prepare to confront the witness in Mr. Mann's absence -- e.g., by talking to Mr. Mann before the viewing -- because they had been told that no testimony would be elicited. Cf. Proffitt at 1260 [attorney did not have information with which to impeach doctor because client was not there to provide it.]) The detective's account, like the doctor's in Proffitt, was left unimpeached. As this Court has explained, even if the information which Mr. Mann could have provided would not have changed the [detective] witness's account, Proffitt, 685 F.2d at 1260-61, Mr. Mann's rights were violated because his absence denied him the right to provide information which could have been used to impeach the witness's account. Id. (This is especially true in a case such as this where the theory of defense was founded on challenging law enforcement's investigative efforts.)

A. THE NEED FOR A HEARING.

At the very least, under Proffitt, Mr. Mann should be allowed the opportunity, at a hearing, to establish the "reasonable possibility" that his absence affected his right to cross-examine and impeach the witness's on-the-scene account. See, e.g., Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984); see also United States v. Stratton, 649 F.2d 1066, 1081 (5th Cir. Unit A 1981) (absence of defendant at prosecutor's summation at co-defendant's trial was harmful error).

26. [continued from previous page]

Highway 19, Nineteenth Street, Seventeenth Street, Nebraska Avenue, the "sandy area," the "grassed-in" area, the "leaved-in" area, the truck in the garage, the neighbor, the "hands and knees" search, etc. To the extent that these matters seem obscure, counsel refers the court to Appendix C, infra, which shows their critical importance.



No evidentiary hearing has ever been held on this claim either in the state courts or the federal district court. Consequently, Mr. Mann's allegations, including the fact that his absence "harmed" and "prejudiced" him, must be taken as true for purposes of this Court's appellate review. See Blackledge v. Allison, 431 U.S. 63 (1977). Contrary to Allison, the panel placed on Mr. Mann the burden of showing prejudice before any evidentiary hearing was held. Mr. Mann could and would show prejudice. Yet, that showing could only be made at a hearing -- where former defense counsel, Mr. Mann, and other witnesses could be called to testify. Mr. Mann's allegations entitled him to relief. To the extent that the record was unclear or insufficient on the question of "prejudice", it was insufficient because no hearing had ever been held. A hearing, therefore, was warranted. See Blackledge v. Allison, supra; Hall v. Wainwright, supra; Townsend v. Sain, 372 U.S. 293 (1963); Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983).

A "reasonable possibility" that Mr. Mann's absence was harmful, Proffitt, supra, does exist in this case. An evidentiary hearing is necessary for Mr. Mann to prove, through the testimony of former counsel, Mr. Mann, and other witnesses, the grave harm caused by his absence.

S. MR. MANN'S CLAIM IS NOT PROCEDURALLY BARRED.²⁷

The Florida Supreme Court did not rule that Mr. Mann's claim is procedurally barred. Rather, the Florida Supreme Court's opinion denying Mr. Mann's request for post-conviction relief spoke only in terms of merits review:

27. In addition to the analysis presented below, Mr. Mann relies on the arguments present in his initial and reply briefs to the panel and on the analysis contained in the panel opinions of Judges Johnson and Clark.



We see no need or benefit in discussing in detail the remainder of Mann's claims in his 3.850 motion. . .

It is obvious and clear that present counsel's complaint of trial counsel's handling of the trial would not have affected the truth-seeking process, the evaluation of the evidence, the proper application of the law, or the outcome of the case. A comparison of the original trial record clearly and conclusively refutes any claim that there was any constitutional infirmity in the trial. The same is true of the appellate process. Although Mann urges vehemently numerous grounds for habeas corpus relief, each is either refuted or is insufficient for relief."

In conclusion, we are satisfied that this was a well and conscientiously tried case by counsel, the trial judge, and the jury. Appellate counsel and this Court have zealously fulfilled their review responsibilities. Accordingly, we affirm the order of the trial judge denying relief under the 3.850 motion. We deny the application for habeas corpus. We deny the application for a stay of execution.

Mann v. State, 482 So.2d at 1362 (emphasis supplied). The presence issue had been presented as an independent claim in both the Rule 3.850 motion and in the state-court petition for a writ of habeas corpus. As the above excerpt demonstrates, a fair reading of the Florida Supreme Court's opinion can lead to only one conclusion: the Court ruled on the merits. Consequently, there exists no "adequate and independent state ground" precluding this Court's review. Michigan v. Long, 463 U.S. 1032 (1983).

The procedural default rule of Wainwright v. Sykes is based on the understanding that "considerations of comity" require that federal courts give the respect that is due to an "adequate and independent state ground" on which a state court has relied to reject a federal claim. 433 U.S. 72, 78-79, 84 (1977), quoting Francis v. Henderson, 425 U.S. 536, 538-39 (1976). Yet, when the state courts fail to expressly indicate that a federal constitutional claim is "barred by some state procedural



rule, a federal court implies no disrespect for the State by entertaining the claim." County Court of Ulster County v. Allen, 442 U.S. 140, 155 (1979); see also Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469 (1983) (state court opinion must clearly express that state court relied on adequate and independent state ground barring federal review; state court reliance on such ground will not be presumed).

Under Ulster County, the critical issue is not whether a state procedural bar exists, but whether the state itself has expressly indicated that a federal claim has been rejected because of a procedural default. Oliver v. Wainwright, 795 F.2d 1524, 1528-29 (11th Cir. 1986); Euell v. Wyrick, 675 F.2d 1007, 1008 (8th Cir. 1982); Klein v. Harris, 667 F.2d 274 (2d Cir. 1981). "The federal court's task is not to apply state procedural rules as though it stood in the state court's shoes", Euell, supra, 675 F.2d at 1008, but to determine whether the state court itself has ruled that a federal claim is barred because of a procedural default. See Silverstein v. Henderson, 706 F.2d 361 (2d Cir. 1983); Maxwell v. Sumner, 673 F.2d 1031, 1034 (9th Cir. 1982); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981); Klein v. Harris, supra; Euell v. Wyrick, supra; Oliver v. Wainwright, supra.

Thus, the determinative question is not whether the state court in this case could have rejected Mr. Mann's claim on procedural grounds, but whether it actually did invoke a state bar to consideration of the claim:

Federal review is not barred by the defendant's violation of a state procedural rule if the state court has overlooked the possible procedural bar and decided the case on the merits. Where . . . the state court might have invoked a procedural bar but has provided no indication that it did so, "a federal court must address the merits" of the petitioner's claim. If the state court does not "indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for



the State by entertaining the claim."

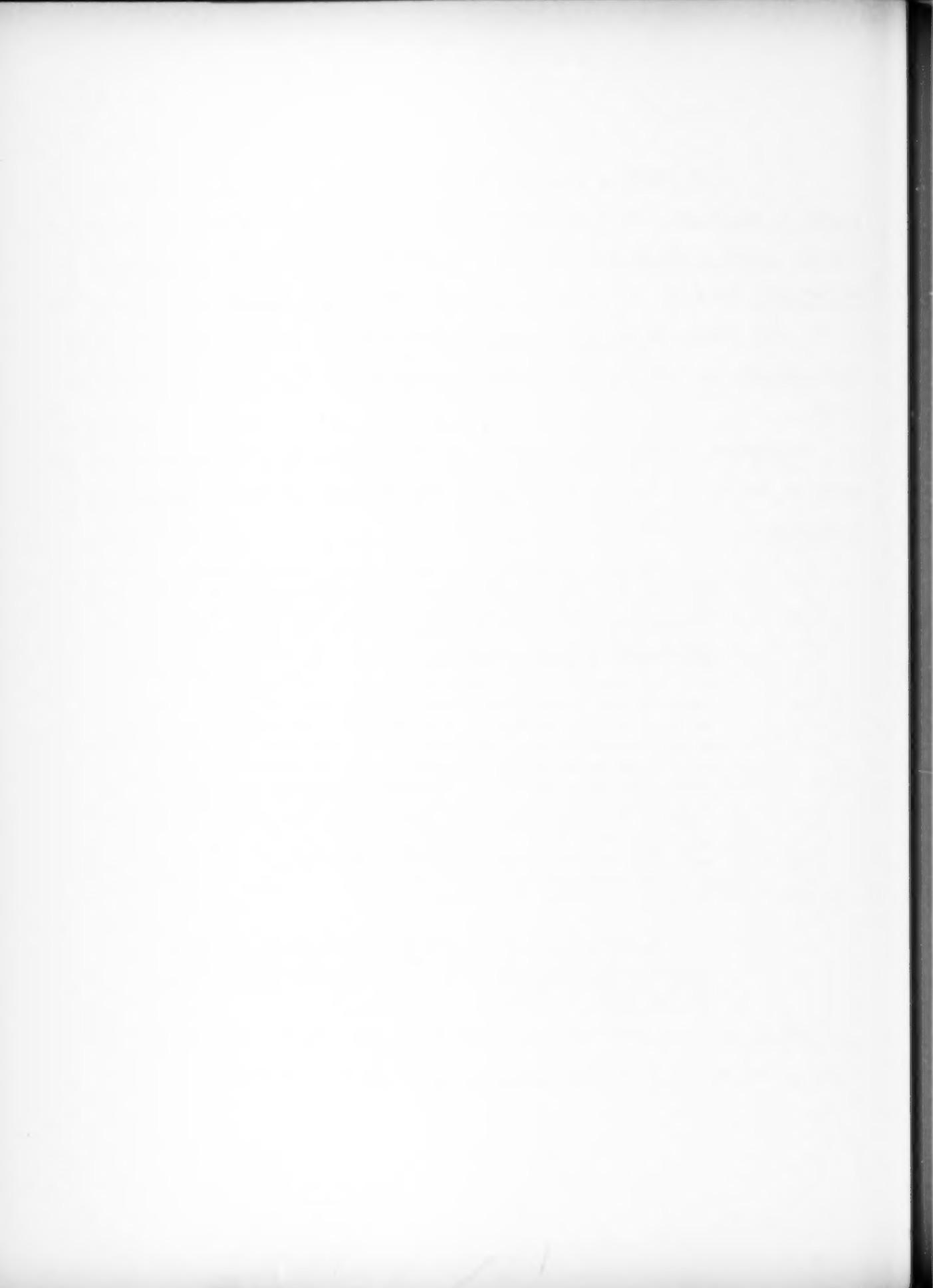
Oliver v. Wainwright, 795 F.2d 1524, 1528-29 (11th Cir. 1986) (citations omitted); accord, Cooper v. Wainwright, 807 F.2d 381, 886-87 (11th Cir. 1986); Campbell v. Wainwright, 738 F.2d 1573, 1576-77 (11th Cir. 1984), cert. denied, ___ U.S. ___, 106 S. Ct. 1652 (1986); Grizzell v. Wainwright, 692 F.2d 722, 724-25 (11th Cir. 1982), cert. denied, 461 U.S. 943 (1983); Moran v. Estelle, 607 F.2d 1140, 1142 (5th Cir. 1979).

The Florida Supreme Court chose not to specifically apply a procedural bar. It spoke to the merits. As the United States Supreme Court has held in Caldwell v. Mississippi:

The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. See Ulster County Court v. Alien, 442 U.S. 40, 152-154, 99 S.Ct. 2213, 2222-2223, 60 L.Ed.2d 777 (1979). Moreover, we will not assume that a state court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Michigan v. Long, 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." Id., at 1041, 103 S.Ct., at 3476.

An examination of the decision below reveals that it contains no clear or express indication that "separate, adequate, and independent" state law grounds were the basis for the Court's judgment.

Id., 105 S. Ct. at 2638-39 (emphasis supplied). That analysis applies with full force to Mr. Mann's claim. See Spencer v. Kemp, 781 F.2d at 1470 & n.21 ("The



principles derived from [direct review] cases . . . are as applicable on federal collateral review of a state court conviction as they are on direct appeal."). No "independent and adequate" state law ground was relied upon by the state court. Cf. Francois v. Wainwright, 741 F.2d 1275, 1281 (11th Cir. 1984).

Moreover, at the very least, the Florida Supreme Court's opinion must be viewed as ambiguous. The Court never clearly applied a procedural bar. Given such an ambiguity, federal merits review is required because "the Sykes rule does not apply when it is not clear that the state appellate court has applied a procedural bar." Walker v. Engle, 703 F.2d 959, 966 (6th Cir. 1983) (emphasis in original), citing Ulster County Court v. Allen, 442 U.S. 140 (1979); see also Oliver, supra.

Ulster County requires the federal courts to determine first whether the state courts have clearly ruled that a procedural default has occurred before employing the Wainwright v. Sykes analysis. If the state courts have not expressly held that a federal claim is barred due to a procedural default, then Sykes does not apply. See Raper v. Mintzes, 706 F.2d 161, 164 (6th Cir. 1983); Maxwell v. Sumner, supra; Oliver, supra; Silverstein, supra.

This Circuit follows this approach. In Campbell v. Wainwright, the state trial court had ruled that issues presented under a Florida Rule of Criminal Procedure 3.850 proceeding:

...and been foreclosed by the appeal in this case, were
judgment decisions of [Campbell's] counsel, or are otherwise
insufficient to justify the relief sought...

738 F.2d 1573, 1577 (11th Cir. 1984). The state appellate court affirmed the trial court's order without expressly indicating "that it would not consider Campbell's allegations because he failed to raise them on appeal." 738 F.2d at 1577. Before



the federal courts, the state argued that the portion of the trial court's order stating that issues were "foreclosed by the appeal" was the application of a procedural bar to Campbell's claims, i.e., a ruling that Campbell had failed to raise the issues in his direct appeal. This Court rejected that argument:

The court may have meant that the issues were correctly decided adversely to Campbell on appeal, and need not be discussed further. In any event, because of the alternative phrasing of the court's order, we cannot determine which issues the court may have considered to be "foreclosed". Given this situation, a federal court must address the merits.

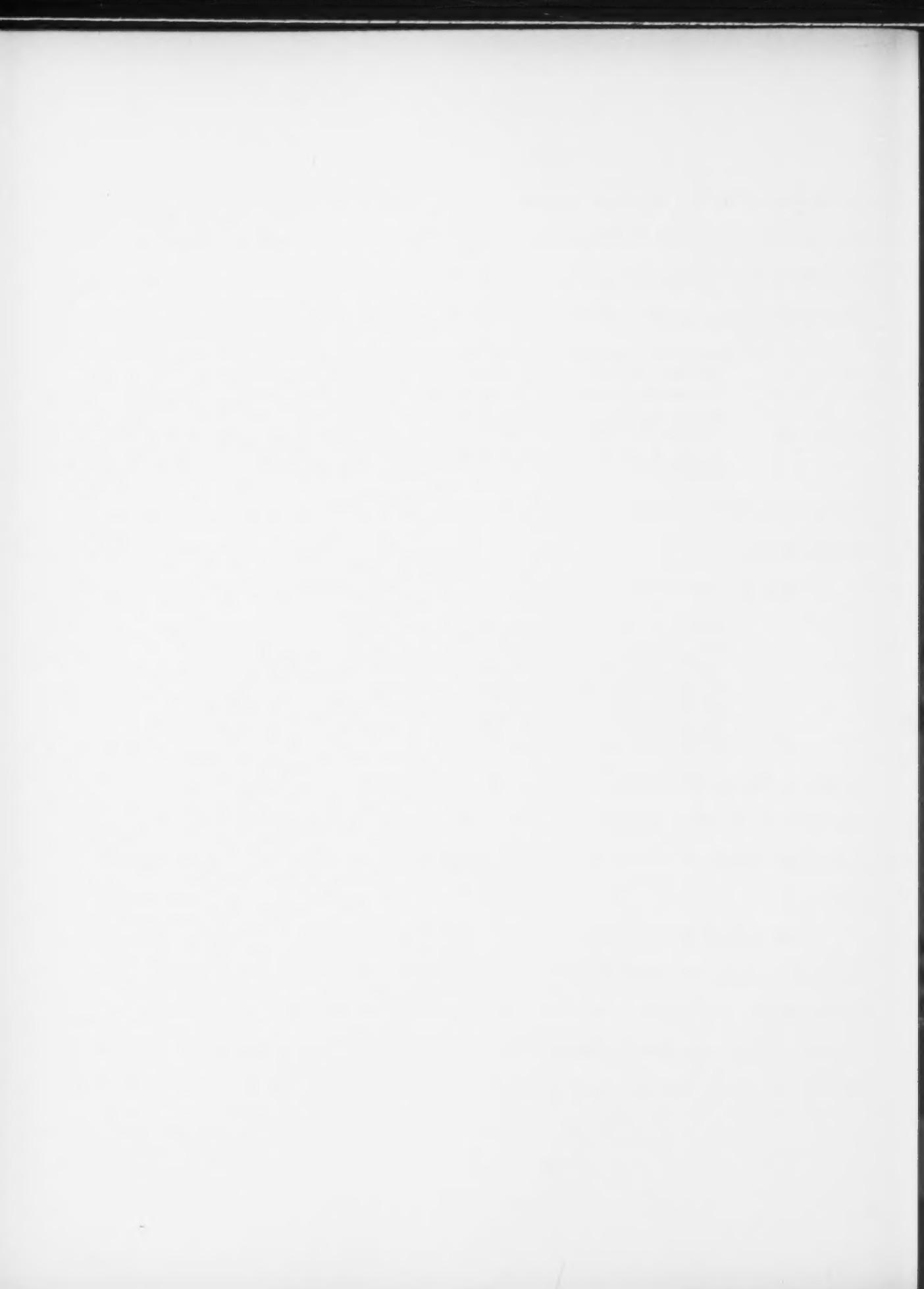
738 F.2d at 1577 (emphasis supplied) (footnote omitted); see also id. at n.2, citing Ulster County.

In Oliver, this Court held that,

Where ... a state court might have invoked a procedural bar but has provided no indication that it did so, "a federal court must address the merits" of the petitioner's claim ... If the state court does not "indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim."

Oliver v. Wainwright, supra, 795 F.2d at 1528-29 (citing Campbell and Ulster County (emphasis supplied). Accord, Silverstein v. Henderson, supra, 706 F.2d 361; Maxwell v. Sumner, supra, 673 F.2d 1031; Kreck v. Spalding, 721 F.2d 1229, 1234 (9th Cir. 1983).

Under Campbell and Oliver, this Circuit's application of the Ulster County and Michigan v. Don analyses mandates that the federal court reach the merits of a habeas corpus petitioner's constitutional claims when the state courts failed to expressly hold that the claims were barred due to a procedural default. Moreover, federal review of the merits of a constitutional claim is required when the state



court's opinion is ambiguous as to the application of a procedural bar. Campbell, supra; Oliver, supra. See also Spencer v. Kemp, supra. As succinctly stated by Judge Clark in his opinion concurring with the panel grant of relief in Mr. Mann's case, "[i]t is not too much to require the state court to be explicit when applying its procedural default rules." 817 F.2d at 1488. The Florida Supreme Court was far from explicit here -- Mr. Mann's claim must therefore be entertained on the merits.

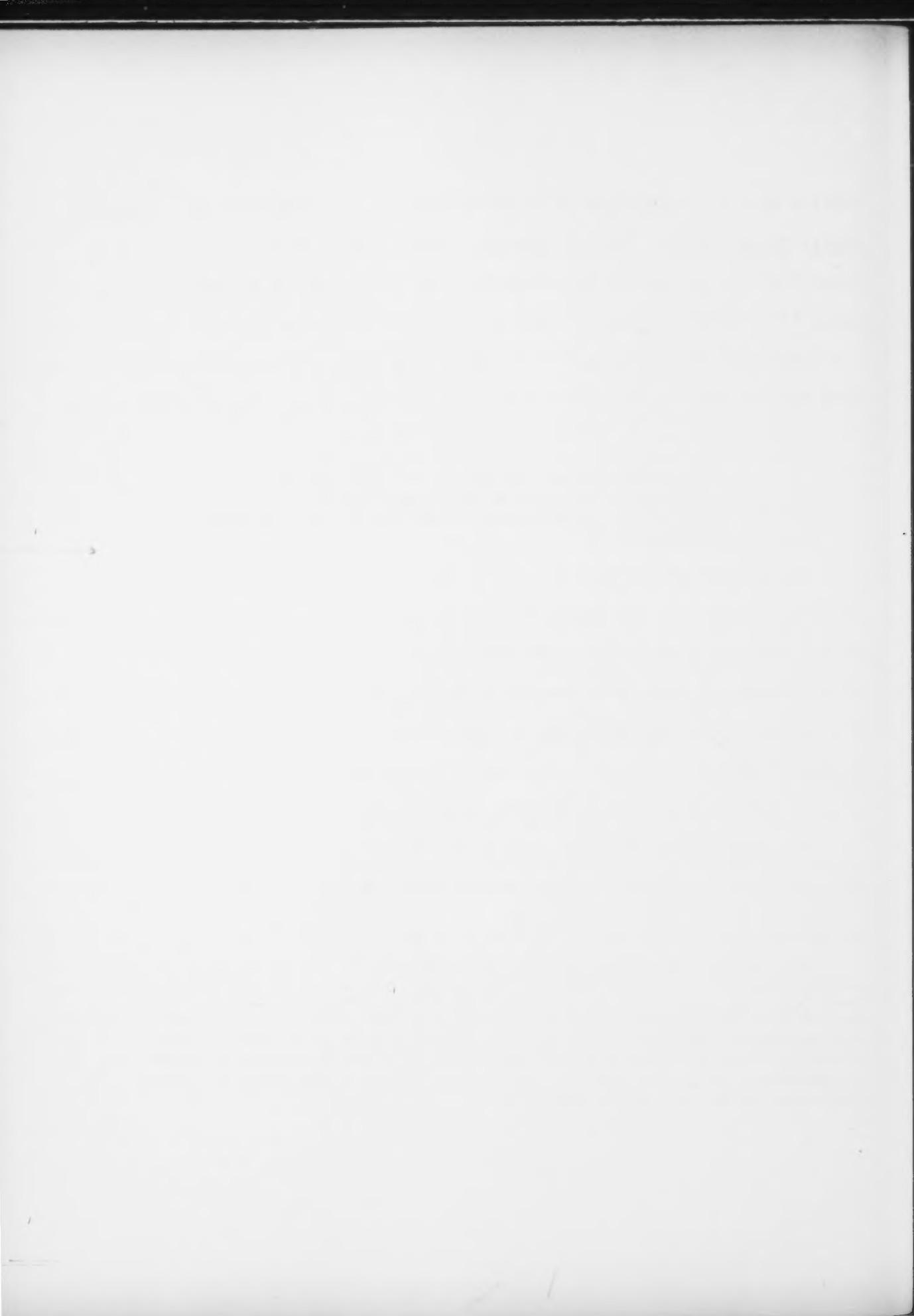
III

THE DEATH SENTENCE IMPOSED ON MR. MANN WAS OBTAINED IN SUBSTANTIAL RELIANCE ON AN UNCONSTITUTIONAL PRIOR CONVICTION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.²⁸

The gravamen of Mr. Mann's claim is that the use of an unconstitutional prior conviction to enhance punishment in his case resulted in a sentence of death obtained on the basis of "misinformation of constitutional magnitude" and thus in a violation of the eighth and fourteenth amendments as interpreted in Zant v. Stephens, 462 U.S. 879, 887-88 (1983), United States v. Tucker, 404 U.S. 443, 447-49 (1972), and Burgett v. Texas, 389 U.S. 109, 115 (1967) (use of unconstitutional prior conviction to enhance punishment permits "a specific federal right [to be] denied anew").

The state courts denied Mr. Mann a hearing on his claim on the basis of a procedural bar which had never before been announced and of which Mr. Mann "could not

28. Mr. Mann's initial [Panel] Brief (pp. 40-60) described the unconstitutionality of the previous Mississippi conviction used to aggravate sentence. See also Petition for a Writ of Habeas Corpus, (R. Vol 1). The panel briefs also described why Florida's reliance on that conviction violated the eighth and fourteenth amendments, why Mr. Mann is entitled to an evidentiary hearing in the district court on this claim, and why the claim is not procedurally barred. Mr. Mann respectfully refers the Court to the panel briefs on these matters. However, one important matter merits discussion herein.



fairly be deemed to have been apprised." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958). That bar does not pass muster under federal analysis, and Mr. Mann is therefore entitled to the opportunity to prove his claim at a hearing in the federal district court.

In his state motion for post-conviction relief, Mr. Mann argued that the Mississippi conviction was unconstitutional and that his challenge to that constitutional infirmity was properly presented in his state-court post-conviction action. The Florida Supreme Court rejected Mr. Mann's "contention that it is appropriate in a collateral attack on his sentence of death to attempt to collaterally attack Mann's prior conviction of a crime of violence in Mississippi. . . ." Mann, 482 So. 2d at 1361.

Prior to that ruling, Florida courts had consistently allowed collateral attacks on the validity of prior convictions used to enhance the penalty for a subsequent offense. See Lee v. State, 217 So. 2d 861 (Fla. 4th DCA 1969) (challenging constitutionality of prior conviction used to support a "second offender" conviction); Hicks v. State, 336 So. 2d 1244 (Fla. 4th DCA 1976) (requiring a hearing in Rule 3.850 proceedings to determine if prior uncounseled conviction had been used in imposing sentence). While the majority of such collateral attacks involved the use of uncounseled prior convictions, see Mann v. Dugger, 817 F.2d 1471, 1484 (11th Cir. 1987), and cases cited therein, Florida courts had never so limited collateral attacks. See Lee, 217 So. 2d 861 (Fla. 4th DCA 1969). Cf. Allen v. State, 463 So. 2d 351, 359-61 (Fla. 1st DCA 1985). The Florida Supreme Court did not rule that such challenges were limited to Gideon v. Wainwright, 372 U.S. 335 (1963), issues in Mr. Mann's case. Rather, for the first time ever, it ruled that any attack on the



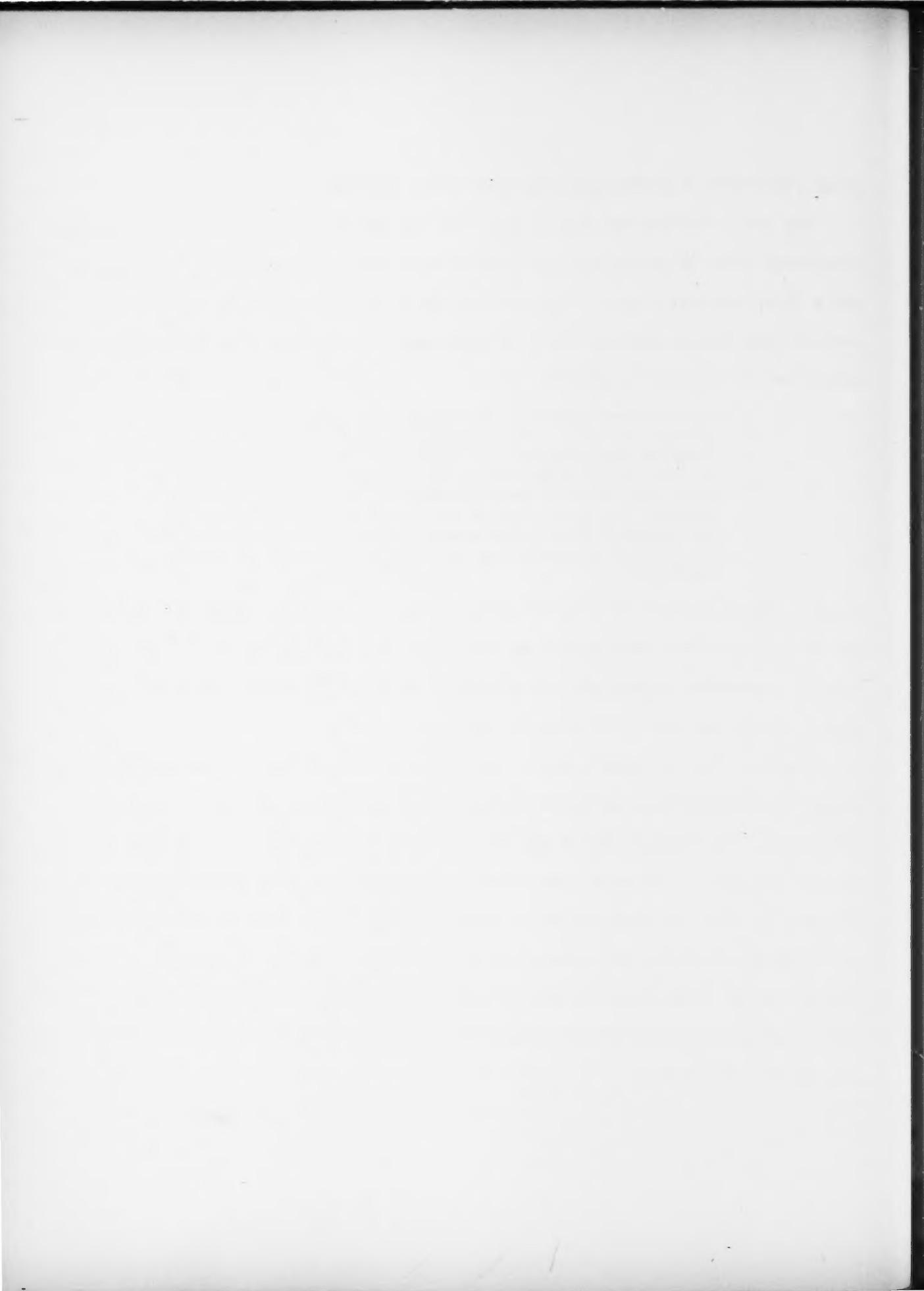
prior conviction in a collateral proceeding was improper.

The law in Florida has always been that the use of a prior conviction to enhance a sentence "must be predicated upon a prior conviction not obtained in violation of one's constitutional rights." Lee, 217 So. 2d at 365. For example, in a related context, the Florida Supreme Court had held that a prior conviction is subject to an attack on its "organic validity":

The relevant aspect of the former conviction is simply its organic validity. For example, it could be shown that the judgment was obtained in a court that lacked jurisdiction, or that it was otherwise so fundamentally defective that it could not constitutionally support a conviction. In this posture, the prior case is not being retried on its merits. The judgment which it produced is merely being subjected to the test of admissibility by applying standards of organic validity.

State v. Davis, 203 So. 2d 160, 162 (Fla. 1967). Cf. Allen v. State, 463 So. 2d 351, 356-59 (Fla. 1st DCA 1985) (prior conviction obtained in violation of any one of several fundamental rights may not be used to establish subsequent offense); Rasul v. State, 498 So. 2d 1022, 1023 (Fla. 2d DCA 1986).

Clearly, when Mr. Mann's motion was filed, a Rule 3.850 motion was the only proper state-court forum in which Mr. Mann could bring his challenge to his prior conviction. The Florida courts had long-recognized Rule 3.850 as the appropriate vehicle for such a challenge. The State of Florida relied upon the Mississippi judgment to establish aggravating factors, thus placing the constitutional validity of the prior conviction at issue in the instant case. See Lee, 217 So. 2d at 365 (facts that prior sentence has expired and prior conviction occurred in another jurisdiction do not preclude collateral attack in courts having jurisdiction over subsequent conviction).



Inexplicably, however, the Florida courts refused to provide Mr. Mann the forum which had always been provided to other litigants raising similar claims. The Florida courts invoked a novel procedural bar of which Mr. Mann "could not fairly be deemed to have been apprised." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958). Such a novel bar simply cannot be deemed an adequate and independent state law ground barring review in this federal court. Spencer v. Kemp, *supra*; see also James v. Kentucky, 466 U.S. 341 (1984) (only "firmly established and regularly followed state practice can prevent implementation of federal constitutional rights"); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) ("We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right of review"); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly").

Mr. Mann's claim is before this Court on the merits. He should be granted an evidentiary hearing in the district court and, thereafter, federal habeas corpus relief.

IV

MR. MANN'S SENTENCE OF DEATH VIOLATES DOYLE V. OHIO AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE IT WAS BASED ON A RECOMMENDATION OF DEATH OBTAINED FROM A JURY WHICH WAS TOLD THAT MR. MANN "SHOWED" NO REMORSE AFTER A POST-ARREST, POST-MIRANDA WARNINGS INVOCATION OF HIS RIGHT TO SILENCE.

A. MR. MANN'S RIGHTS UNDER DOYLE V. OHIO, WAINWRIGHT V. GREENFIELD, AND THE EIGHTH AMENDMENT WERE VIOLATED.

At the penalty phase of Mr. Mann's trial, the state presented the testimony of Lieutenant Judson Brooks, a Pascagoula, Mississippi, police officer (ROA 2375).



Lieutenant Brooks had arrested Mr. Mann for a 1973 burglary charge in Mississippi (ROA 2376). Prior to Brooks' testimony, at a sidebar conference, the state explained that the purpose of Brooks' testimony was to demonstrate "the Defendant's reaction as to when he was arrested. I think it will go to the psychiatric testimony in terms of the man's emotional status and condition" (ROA 2374).

Lieutenant Brooks testified that he traveled to Titusville, Florida, where Mr. Mann had been placed in custody, to arrest Mr. Mann and transport him back to Mississippi (ROA 2376). After Lieutenant Brooks explained that he "present[ed] the [arrest] warrant to the suspect . . . and advise[d] him in reference to the charges" (ROA 2376), the following exchange occurred between the prosecutor and Lieutenant Brooks:

Q When you read that warrant to him, were you looking at him?

A Yes, sir.

Q Did he display any remorse at that time?

A No, sir.

Q Did he display any regret at that time?

A No, sir.

Q Did he display any sorrow?

A No, sir.

Q Subsequent to that, did you drive back to Pascagoula, Mississippi, with him in your presence?

A Yes, sir.

Q During that entire time period, did the man show any emotion at all?



A In reference to the charges, no. The only emotion he ever showed was an occasion in Daytona Beach when we stopped for dinner, and he became emotionally upset because I would not let him have beer with his meals.

Q That's the only time he ever showed emotion, when you wouldn't let him drink beer with his dinner?

A That's correct.

Q That was after he was arrested on the charges you just read?

A Yes.

(ROA 2377-78).

The lack of communication Lieutenant Brooks was referring to occurred after he had arrested Mr. Mann and provided him with Miranda warnings. In an affidavit in January, 1986, Lieutenant Brooks attested:

[I]t is my normal procedure to advise defendants of their Miranda rights immediately upon placing them under arrest.

Larry Eugene Mann made no statements and therefore none were used against him in his Mississippi conviction.

(Pet. App., Volume 1, section 10).²⁹/

The state's presentation and use of this testimony regarding Mr. Mann's post-Miranda silence fit into the theme begun during the guilt/innocence phase closing arguments that Mr. Mann was a person without emotion:

29. The allegations presented to the district court were sufficient, if true, to warrant habeas corpus relief. Mr. Mann was therefore entitled to an evidentiary hearing on his claim.



You sat through this entire trial . . . and I have watched you look at the Defendant. How would you describe him during the course of what can only be described as emotionally heartrending testimony the first day of this trial? Did his expression change? Was he moved by emotion at all? Or did he appear to be cold and calculated? You look at him, and he shows no emotion at all. . . .

(ROA 2271).

Working up to Lieutenant Brooks' testimony, the state presented the testimony of Debra Johnson, the victim of the Mississippi offense." After Ms. Johnson described her in-court identification of Mr. Mann, the prosecutor turned the questioning to Mr. Mann's emotional condition at that time:

Q During the time that this was going on, did Mr. Mann display any emotion to you whatsoever?

A No, he didn't.

Q Did he ever display any remorse or regret?

A No, he didn't.

Q Did the expression change on his face?

A No.

(ROA 2372-73). The state then presented Lieutenant Brooks, with the sole purpose of completing the picture of Mr. Mann as cold, unfeeling, and inhuman.

Finally, the state relied on this picture in closing argument at the penalty phase, portraying Mr. Mann as a person who "does not deserve to remain alive" (ROA 2436). The state's argument was that Mr. Mann was a "pathological killer" (ROA 2437), whose behavior could not be explained by the defense's "absurd" psychiatric evidence (ROA 2432-33).

The presentation and use of evidence of post-Miranda silence is forbidden by the



United States Constitution. Doyle v. Ohio, 426 U.S. 610 (1976). Doyle reversed a criminal conviction where the prosecution attempted to impeach a defendant's exculpatory trial testimony by eliciting testimony that the defendant remained silent following Miranda warnings. The Court reasoned that the promise of a right to remain silent carries with it the implicit promise that silence will not be penalized. Doyle, 426 U.S. 610, 619, quoting United States v. Hale, 422 U.S. 171, 182-83 (1975) (White, J., concurring). Thus, use of a defendant's post-Miranda silence is fundamentally unfair, in violation of the due process clause of the fourteenth amendment. Doyle, 426 U.S. 610, 619.

Similarly, post-Miranda silence may not be used to rebut an insanity defense. Wainwright v. Greenfield, 106 S.Ct. 634 (1986). Using post-Miranda silence as affirmative proof is indistinguishable from using such silence for impeachment:

The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Greenfield, 106 S.Ct. 634, 639. The Court concluded that just like Doyle, "Greenfield received 'the sort of implicit promise to forego use of evidence that would unfairly "trick" [him] if the evidence were later offered against him at trial.'" Id. at 640, quoting South Dakota v. Neville, 459 U.S. 533, 566 (1983).

The considerations highlighted in Doyle and Greenfield are especially important



at a capital sentencing phase. The Constitution requires heightened reliability at a penalty proceeding where a defendant's life is at stake. Gardner v. Florida, 430 U.S. 349 (1977). Therefore, just as a defendant's exercise of constitutional rights may not be used to obtain his conviction, even more so may the exercise of those rights not be used to take his life. See, e.g., Estelle v. Smith, 451 U.S. 454, 462-63 (1981) ("Just as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument' of his own conviction, . . . it protects him as well from being made the 'deluded instrument' of his own execution. . . . We can discern no basis to distinguish between the guilt and penalty phase . . . so far as the protection of the Fifth Amendment is concerned.").

At Mr. Mann's trial, the state presented evidence of Mr. Mann's post-Miranda silence for the stated purpose of showing "the Defendant's reaction as to when he was arrested. I think it will go to the psychiatric testimony in terms of the man's emotional status and condition" (ROA 2374). The state thus used Mr. Mann's silence as affirmative proof rebutting his psychiatric mitigating evidence, and as affirmative proof of aggravation--no remorse. Mr. Mann presented psychiatric testimony concerning his paranoid rage and irresistible pedophilia, and the self-hate, sorrow, and pain which Mr. Mann experienced because of his condition. The "no remorse" testimony undercut Mr. Mann's mitigation and was used to aggravate the offense -- it gave the jury an additional reason to sentence Mr. Mann to death.^{30/}

30. Consequently, contrary to the panel's analysis, because the prosecution used Mr. Mann's post-Miranda silence before the jury in a capital sentencing proceeding as both evidence rebutting mitigation and proving aggravation, the Doyle violation cannot be harmless error. Although a Doyle error may be found harmless, see Doyle, 426 U.S. at 620, such a "decision requires an examination of the facts, [footnote continued on next page]



There is more than a reasonable probability that the comments on Mr. Mann's silence contributed to his death sentence. The prosecution highlighted, stressed, and focused on Mr. Mann's silence, asking Lt. Brooks five times and Ms. Johnson three times about Mr. Mann's emotional status. The testimony was purposely elicited, as the prosecutor stated before the testimony began (ROA 2374), as a planned part of the state's case for death. There was no objection to it, and the jury was never told to disregard the testimony. The repetitive questioning focused the jury's attention on the precise point the prosecution was trying to make -- that Larry Mann was inhuman and did not deserve to live. But the point was made by use of Mr. Mann's post-Miranda warnings silence. This Doyle prohibits.

The evidence of "guilt" -- that death was the appropriate sentence -- was not so powerful and overwhelming as to make the error here harmless. The defense presented the jurors with powerful and persuasive evidence of Mr. Mann's mental illness, his family life, his employment, and his military service. In fact, the plausibility of the defense case was the precise reason why the state presented Lt. Brooks' testimony: "it will go to the psychiatric testimony in terms of the man's emotional status and condition" (ROA 2374). As such, the testimony was calculated to, and did, "strike at the jugular" of Mr. Mann's defense.

30. [continued from previous page]

the trial context of the error, and the prejudice created thereby as juxtaposed against the strength of the evidence of defendant's guilt." United States v. Meneses-Davila, 580 F.2d 888, 890 (5th Cir. 1978). If this examination shows that there is no reasonable probability that the Doyle violation contributed to the conviction [in this case, the jury's death recommendation] the error is "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18 (1967). See Chapman v. United States, 547 F.2d 1240, 1249 (1977); Alderman v. Austin, 695 F.2d 124, 126 (1983). That showing cannot be made in Mr. Mann's case.



The testimony regarding Mr. Mann's post-Miranda silence went hand-in-hand with prosecutorial misconduct of the most egregious sort. (See, e.g., ROA 2430-32, 2435-36, 2437-38). It focused the jury's attention on an impermissible aggravating factor -- lack of remorse -- presented to prove that Mr. Mann had been so unrepentant for so long that there was no solution except to execute him. It struck at the heart of Mr. Mann's mitigation -- that he was seriously mentally ill -- to portray him as a cold and calculating monster, devoid of human emotion. It was by no means harmless beyond a reasonable doubt.

B. MR. MANN'S CLAIM IS NOT A PROCEDURALLY BARRED.

The arguments presented in Issue II, infra, which demonstrated that federal review of that claim was not barred by any adequate and independent state law ground apply with equal force to Mr. Mann's Doyle/Greenfield claim.³¹/

31. Additionally, Mr. Mann respectfully refers the Court to the arguments presented in his initial and reply briefs to the panel, as well as to the discussion concerning procedural default in the panel opinions of Judges Johnson and Clark.



CONCLUSION

The district court's denial of the writ should be reversed; Mr. Mann's case should be remanded for an evidentiary hearing; and, Mr. Mann should be granted the habeas corpus relief he seeks.

RESPECTFULLY SUBMITTED,

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By: Talbot D'Alemberte
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Gary Welch and Michael Kotler, Assistant Attorneys General, Department of Legal Affairs, Park Trammell Building, Suite 804, 1013 Tampa Street, Tampa, Florida 33602, this 23rd day of October, 1987.

Talbot D'Alemberte

Attorney





APPENDIX A



1 throughout the entire course of the prosecution, I
2 believe the thrust of the prosecution will be that she
3 was abducted and that she died in a grove and that
4 she never physically entered Mr. Mann's house or left
5 his truck.

6 And on a warrant to search Mr. Mann's house, we
7 are just suggesting and we're arguing that it has no
8 connection whatever with the murder of this victim.
9 If there is any plain logic in the State's position,
10 it should have been outlined in the affidavit. It is
11 not outlined in the affidavit.

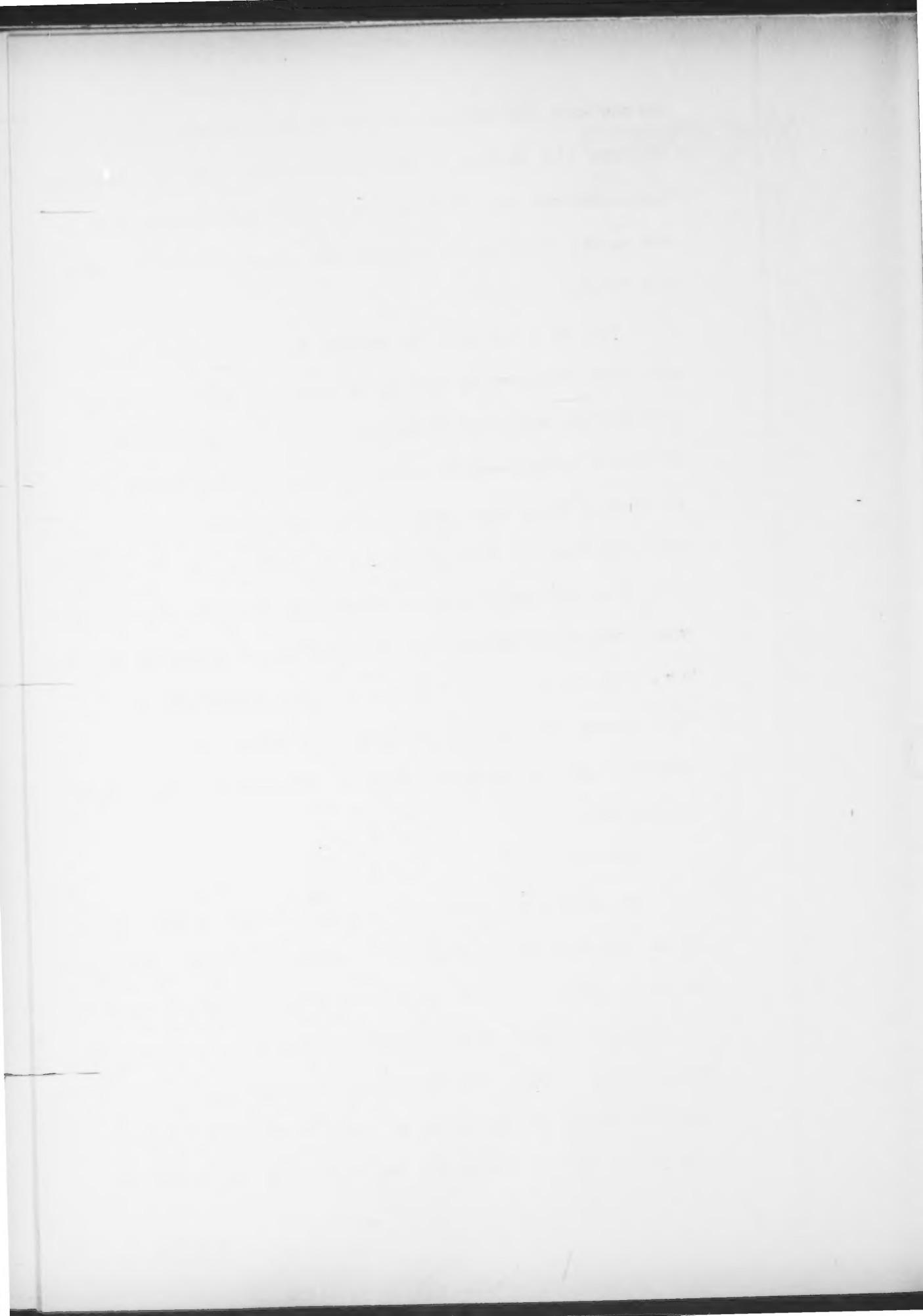
12 The affidavit should speak for itself. It does
13 not. For that reason, we would move to suppress it.

14 THE COURT: The Court will find specifically
15 that there was sufficient probable cause for the
16 issuance of the search warrant. Therefore, the motion
17 is denied.

18 Next motion?

19 MR. DOHERTY: The next motion, Judge, that I have
20 is an amended motion for individual voir dire. Attached
21 to it, I have the case of Hovey versus Superior Court
22 of Alameda County, a California case, Supreme Court of
23 California, 1980. The thrust of this motion is to
24 ask the Court to allow us to individually voir dire
25 the jury; and in doing so, we're asking the Court not

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1 we would ask the Court to grant our motion.

2 SCHAEFFER: Judge, the second reason for that,
3 I would like to add, initially when this motion was
4 raised by Mr. Doherty, Judge Andrews denied the motion
5 for individual voir dire with leave to come back before
6 this Court at a later time.

7 The issue that was raised particularly there --
8 this is a new issue in the amended motion. We would
9 like to renew our grounds that we raised at that time.
10 In essence, what we said at that time is that there
11 had been quite a bit of pre-trial publicity in the
12 St. Petersburg Times, the Evening Independent in the
13 south county, and the Clearwater Times and Clearwater
14 Sun.

15 Since this motion has been argued before Judge
16 Andrews, there has been additional pre-trial publicity.
17 The problem that we see as defense lawyers, obviously,
18 is it is necessary for us to inquire which, if any,
19 of these potential jurors have read information in the
20 paper.

21 Now, if, in fact, there was information in the
22 paper, all of which was going to come out in the trial,
23 then it would not matter if they had read it because
24 they would hear it anyway. But we have a lot of
25 problems, because in these particular articles in

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1 THE COURT: I will deny the motion for individual
2 voir dire. If it should appear during the course of
3 the voir dire that that might be appropriate, I'll
4 reconsider that motion. But at this time, it will be
5 denied.

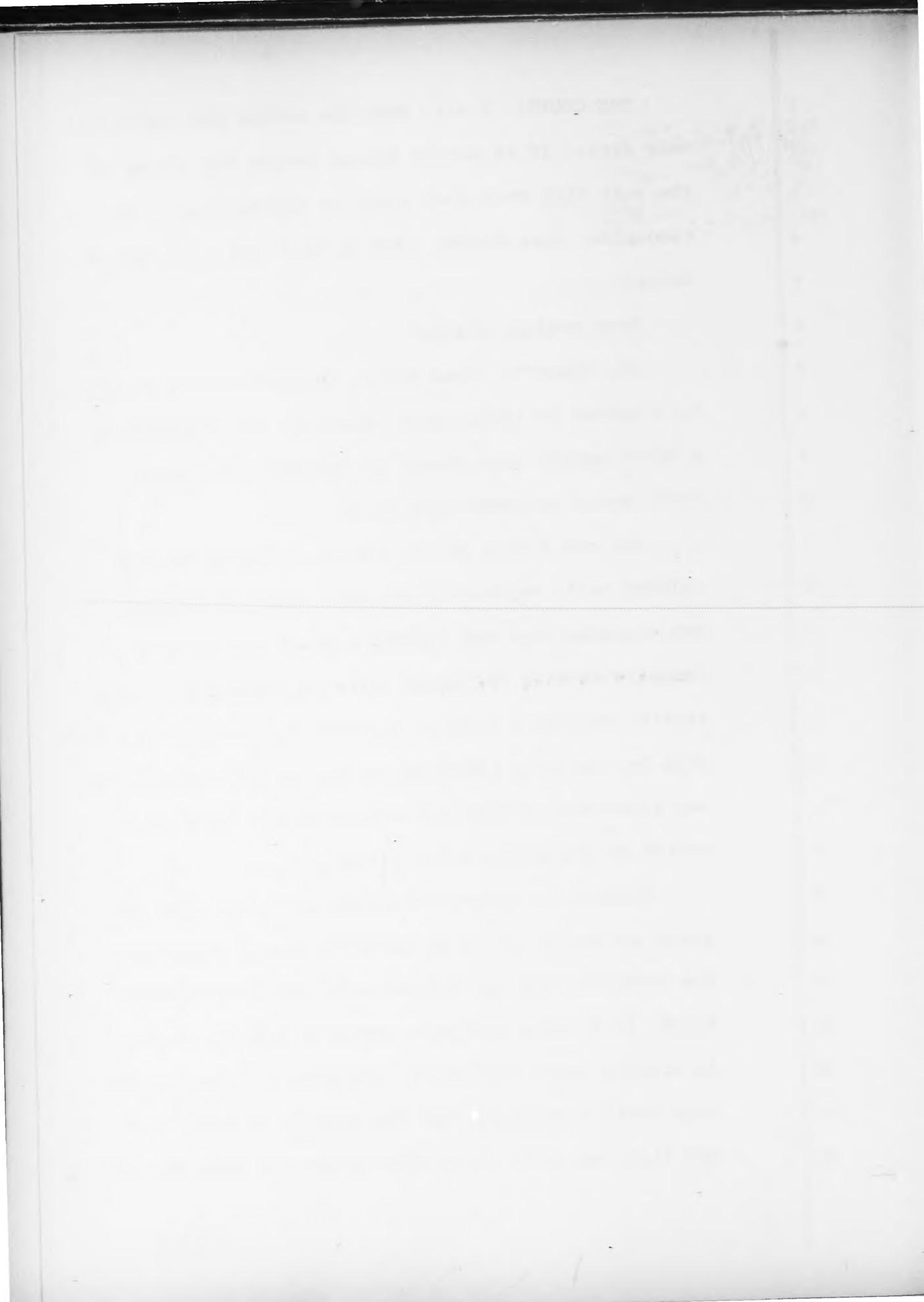
6 Next motion, please.

7 MR. DOHERTY: Your Honor, the next motion we have
8 is a motion in limine with regard to the testimony of
9 a blood expert with regard to luminol, the luminol
10 test, and a phenophthalein test.

11 And the thrust of our motion in limine is that
12 neither test, separately nor both tests in tandem,
13 can conclude that the substance which has given a
14 positive reading for these tests is human blood. The
15 expert, Theodore Yeshion, pointed out in his deposition
16 that neither test individually nor both in conjunction
17 can eliminate household bleach or animal blood as a
18 source of the positive reaction.

19 Neither can these tests tell this jury when the
20 stain was made. It is an accepted proposition that
21 the Defendant has not always owned this 1956 pick-up
22 truck, that there have been previous owners. There
23 is nothing about this guy's testimony that would lead
24 this Court to believe, nor the jury to believe, that
25 the stain was made while this person was even the owner

1123



1
2 (THEREUPON, the prospective jurors indicated
3 affirmatively.)

4 MR. MEISSNER: You have heard the judge say that
5 this jury needs to be sequestered. This case will,
6 in best estimates of counsel, take at least through
7 Wednesday and possibly through Thursday to complete.
8 It should not go into Friday, although it may. It
9 will not spill over into the weekend or next week.

10 It has been agreed that the jury should be
11 sequestered. There may be news coverage of this
12 proceeding, and your attention needs to be directed
13 only to what comes from the witness stand and nothing
14 what you may read or hear in the press or in the media
15 about this case, because that's not evidence. Do you
16 all agree with that, with that concept?

17 (THEREUPON, the prospective jurors indicated
18 affirmatively.)

19 MR. MEISSNER: Judge Federico sits there as the
20 embodiment of the law in this case. He makes a
21 determination as to what you can hear and what can be
22 presented to you. He passes upon the legality or
23 the legal admissibility of the evidence, and he doesn't
24 have the opportunity to do that in terms of what the
25 press may report or the emphasis that the press may
give to something that may be out of proportion to its



real importance. Does that make sense to you all?

(WHEREUPON, the prospective jurors indicated
Affirmatively.)

MR. MEISSNER: We all understand that being sequestered is a hardship, but it's necessary. In our system of justice, you heard the judge indicate that Larry Mann, the Defendant, has been indicted by a Grand Jury in Pinellas County and charged with first degree murder and kidnapping. We have gone as far as we can go at this point in processing this case through the system. We can go no further without a jury to hear the facts and pass upon the matters of guilt or innocence.

You all realize that, that this Defendant has asserted his right to a jury trial and he is entitled to a jury trial? He is entitled to have the State prove evidence, present evidence and prove its case against him, and that we can't do anything more until twelve people agree to sit as a jury, sacrificing a little time out of their lives to accommodate the system that we all live by.

So, I heard the audible groan, we all heard that. We know it's an imposition, jury service. Under the best of circumstances, jury service is an imposition. But if you all don't do it, there isn't anybody else



1 MR. McMULLEN: No, sir.

2 MR. MEISSNER: Mr. McMullen, have you ever served
3 on a jury before?

4 MR. McMULLEN: No.

5 MR. MEISSNER: In terms of fulfilling your
6 function as jurors, I want to address a couple of
7 questions to you. You all do understand that a jury
8 in a criminal case tries the facts of the case. I
9 have already indicated that Judge Federico passes on
10 questions of law. Do you all understand and agree
11 that you don't sit there as twelve lawyers? You will
12 be convinced at the end of this thing there are enough
13 lawyers in the courtroom.

14 Your function as individuals of diverse backgrounds,
15 as persons representing the community, is to bring
16 your experience and your wealth of knowledge to this
17 situation and apply your common sense and intelligence
18 to the evidence and the testimony that you hear in
19 reaching your decision. Do you all agree with that
20 proposition, that this is really not an opportunity to
21 be Sherlock Holmes or Clarence Darrow; that you have a
22 specific function to perform, as the attorneys do in
23 the case and as the judge? Do you all agree with that
24 proposition?

25 (THEREUPON, the prospective jurors indicated

affirmatively.)

15 MR. MEISSNER: The judge will instruct you on the
16 law in the State of Florida, if you are chosen to sit
17 on this jury, at the conclusion of the case. In fact,
18 you will have the opportunity to take those instructions
19 back to the jury room with you. The bottom line of
20 that is that you do agree with the fundamental
21 proposition, again, that you apply the law as Judge
22 Federico gives it to you and not as you think the
23 law should be, or as the law was in New Jersey or as
24 the law was in Pennsylvania or anything of that nature?

25 Can you all commit to follow the law that Judge
1 Federico gives you in applying it to the facts, in
2 reaching a determination in this case? Does anybody
3 have any difficulty with that?

4 (THEREUPON, the prospective jurors indicated
5 negatively.)

6 MR. MEISSNER: The Defendant has asserted his
7 right to a jury trial. You're here and you're going
8 to give him his jury trial. You're going to determine
9 the issue of guilt and innocence, or the jury that
10 sits will determine the issue of guilt or innocence.
11 In that regard, the jury acts alone. Nobody else
12 second-guesses you. You make the determination of
13 the weight and sufficiency of the evidence, the



1 credibility of the witnesses, and you come back and
2 judge Federico whether he is guilty or innocent.

3 Are there any of you that are unwilling or feel
4 that you are unable to undertake that responsibility
5 under your oaths as jurors and citizens of Pinellas
6 County? Do you all think you can do that?

7 (THEREUPON, the prospective jurors indicated
8 affirmatively.)

9 MR. MEISSNER: Okay. You have diverse backgrounds.
10 I notice, Doctor Lee, that you are a medical doctor.

11 DR. LEE: Yes.

12 MR. MEISSNER: Do you have a specialty, ~~sir~~.

13 DR. LEE: Cardiology.

14 MR. MEISSNER: Cardiology. I ask that because
15 this becomes important in the scheme of things in a
16 particular case, Doctor Lee, because in this case, we
17 intend to call Doctor Corcoran, who is a pathologist.
18 He works with the Medical Examiner's office. He is
19 going to give testimony and render an opinion with
20 regard to cause of death, as pathologists and medical
21 examiners are trained to do. Do you think you would
22 have any difficulty -- have you had any difficulty
23 with pathologists that would make you say, I wouldn't
24 believe anything a pathologist tells me, or I would
25 believe anything a pathologist tells me?



1 important to the Defendant. We not only want to try
2 this Defendant, we want to give him a fair trial, as
3 fair a trial as we can before we pronounce a verdict.

4 Do you all agree with that?

5 (THEREUPON, the prospective jurors indicated
6 affirmatively.)

7 MR. MEISSNER: This case, as you know by now,
8 involves the charge of murder in the first degree.
9 Murder in the first degree can be a capital offense
10 in the State of Florida. It is an offense for which
11 the Court may impose the death penalty. Now, whether
12 you agree or you don't agree with the imposition of
13 the death penalty is relevant to us in this case and
14 relevant under the law, only as it may affect your
15 ability to render a fair and impartial verdict.

16 And to put that another way, regardless of your
17 personal feelings for or against the death penalty,
18 would the fact that this case may result in the Court
19 imposing the death penalty raise such a problem with
20 you that you do not feel that you could convict if the
21 evidence was there to convict?

22 DR. LEE: I may have --

23 MR. MEISSNER: Doctor Lee, you feel you have that
24 problem?

25 DR. LEE: I have got a mixed bag of worms on this

1210



1 we actually have two stages or two phases of the
2 proceedings.

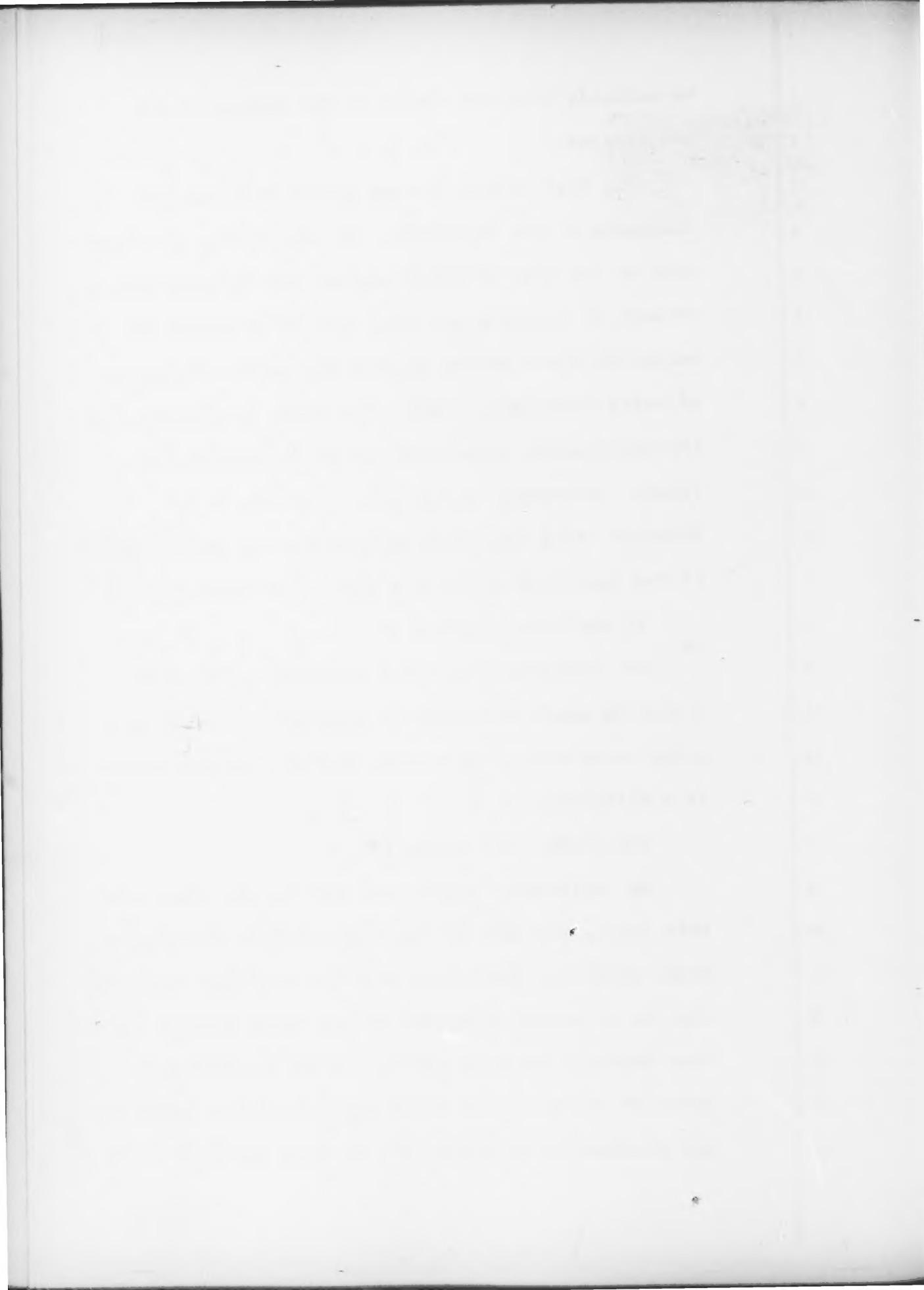
3 The first phase relates to the guilt or the
4 innocence of the Defendant. At that point, the State
5 puts on its case in chief against the Defendant in an
6 attempt to convince the jury that he is guilty of
7 murdering Elisa Nelson, beyond and to the exclusion
8 of every reasonable doubt. The jury, in Florida, has
9 the opportunity to go back and to deliberate that
10 issue. Obviously, if the jury finds him to be
11 innocent, they come back and say so, and he walks out
12 of the courtroom and that's the end of that.

13 If the jury, however --

14 MS. SCHAEFFER: A brief objection at this point.
15 I wish he would not refer to innocent. I think it's
16 going to be guilty versus not guilty. I think there
17 is a difference.

18 THE COURT: All right.

19 MR. MEISSNER: Thank you. If, on the other hand,
20 this jury ultimately at the conclusion of the State's
21 case, convicts, walks back into the courtroom and says
22 that he is guilty of murder in the first degree, there
23 then begins a separate portion of the proceeding in
24 front of the same jury panel with additional testimony
25 and evidence being presented, at which time you again --



these are matters that were not brought to your
attention in the prior portion of the trial. The
jury then has the opportunity to go back and deliberate
whether or not you will come back and make a
recommendation of mercy to the Court.

The recommendation that you make to Judge
Federico in this portion of the trial is simply a
recommendation, and he is not bound by it. He may
impose whatever sentence the law permits. He will
have been here and will have listened to all of the
testimony himself.

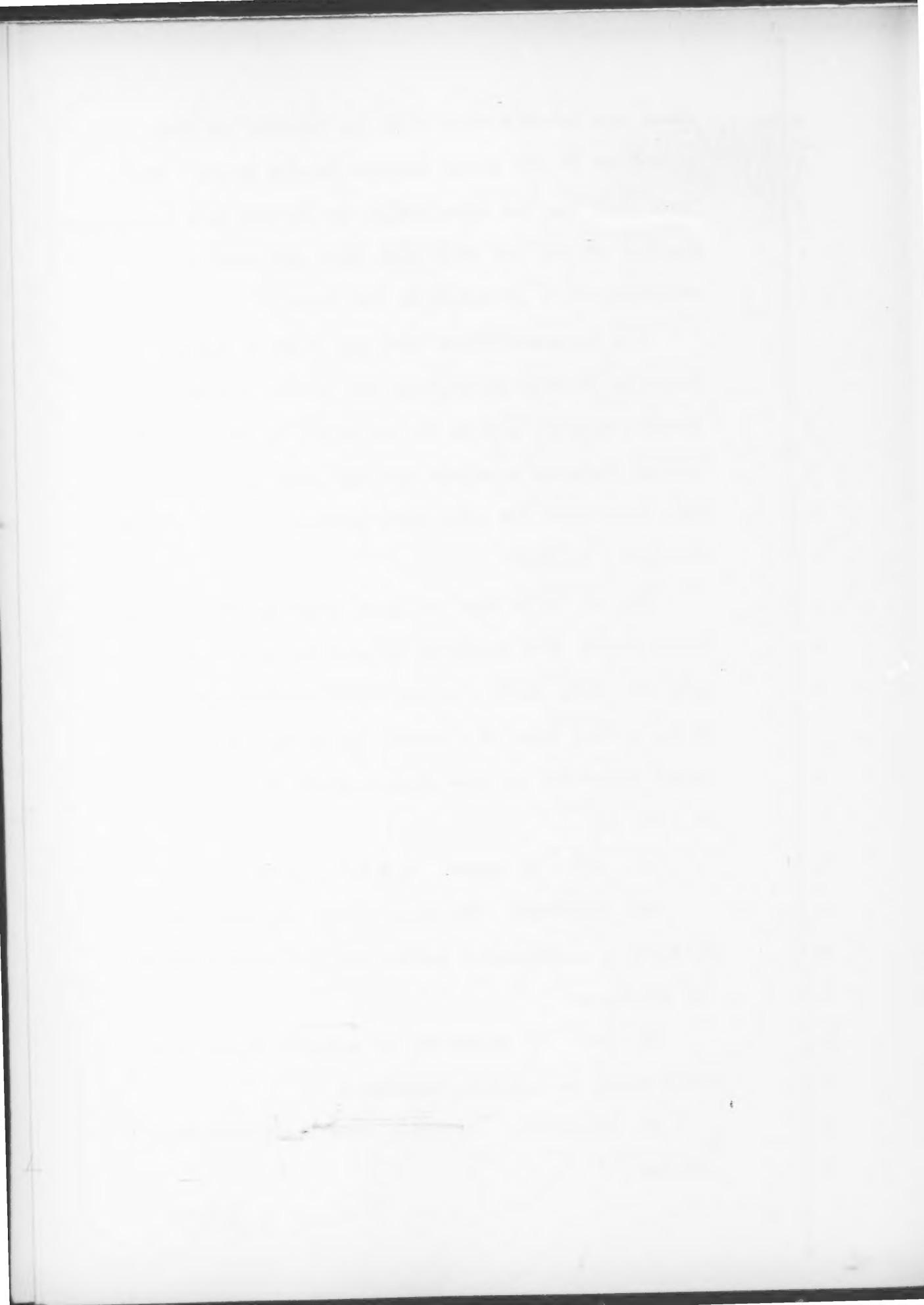
Doctor, with that in mind, knowing that in the
first phase, the question is, did he do it, would
your feelings about the taking of a human life, whether
it be in the form of a murder or in the form of a
legal execution at some point, would the possibility
of that --

DR. LEE: It would not change my feelings.

MR. MEISSNER: You still think you would have
difficulty rendering a guilty verdict regardless of
the evidence?

DR. LEE: If there was an outside chance that
there might be capital punishment --

MS. SCHAEFFER: We would have the Witherspoon
problem.



1 MR. MEISSNER: Yes, we may have.

2 THE COURT: Doctor, you may be excused.

3 Ms. Bonebrake.

4 MR. MEISSNER: What was the last name?

5 THE COURT: Bonebrake, B-O-N-E-B-R-A-K-E.

6 THE BAILIFF: Remain standing, ma'am, face the
7 Clerk, and raise your right hand.

8 (THEREUPON, Prospective Juror Number Two was
9 duly sworn.)

10 MR. MEISSNER: Good morning, Ms. Bonebrake. Were
11 you able to hear all of my questions and the ~~answers~~?

12 MS. BONEBRAKE: Yes.

13 MR. MEISSNER: Have you had any problem with any
14 of the questions or anything that would cause you
15 difficulty in sitting on this jury so far?

16 MS. BONEBRAKE: No.

17 MR. MEISSNER: Okay. Are we all now up to speed
18 on where we're going? Do you understand that the first
19 portion of the trial relates to guilty/not guilty? The
20 second separate portion of the trial involves different
21 evidence, different testimony, the possibility of that,
22 in deeming whether or not you will recommend to the
23 judge mercy in dealing with the Defendant? Does everybody
24 understand that that's the procedure that will be
25 followed in this case now?

1217



1 Do any of you have feelings, as Doctor Lee did,
2 any of you feel as Doctor Lee did with regard to
3 the imposition of the death penalty, that possibility?
4 You understand you do not impose the death penalty;
5 that is not on your shoulders. The ultimate decision
6 rests with Judge Federico. But as I have tried to
7 explain it to you, do any of you hold the opinion, as
8 Doctor Lee did -- he has such a moral dilemma as a
9 result of his training as a physician with even the
10 possibility that someone else would impose the death
11 penalty in this case, even feeling it was ~~warranted~~
12 the imposition.

13 That causes him such problems that he could not,
14 regardless of the evidence, no matter how damning the
15 evidence would be against the Defendant, that he could
16 not vote to find him guilty of murder in the first
17 degree. Do any of you have that problem? I need an
18 assurance from each of you on this.

19 MR. GORDON: What's the alternative? Is it life
20 in prison?

21 MR. MEISSNER: Yes, it is. Again, that decision
22 rests up here with the law, with Judge Federico. You
23 will have the opportunity after you have heard
24 everything there is to hear to make a recommendation
25 to him. But it is not legally on your shoulders,



though. It is not your ultimate decision. You act in
that regard in an advisory capacity only. Does that
cause you any difficulty?

MR. GORDON: No.

MR. MEISSNER: Ms. Bonebrake, you have never
served on a Grand Jury before?

MS. BONEBRAKE: No.

MR. MEISSNER: You have never been a member of a
panel that investigates offenses and makes a
recommendation as to whether to charge --

MS. BONEBRAKE: No.

MR. MEISSNER: You have never served on a petit
jury or a trial jury before?

MS. BONEBRAKE: Never.

MR. MEISSNER: Were you a schoolteacher, ma'am?

MS. BONEBRAKE: Yes, sir.

MR. MEISSNER: What grade and what subject matters
did you teach?

MS. BONEBRAKE: Junior and senior high school,
mathematics and home economics.

MR. MEISSNER: Okay. I assume you did not teach
sophisticated mathematics as it relates to probability
and that kind of thing to any great extent?

MS. BONEBRAKE: Not to that extent. It was
primarily elementary algebra.

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degree murder, you have a lesser charge of second
degree murder; you have a lesser charge of third degree
murder, and a lesser charge of manslaughter. You can
return a guilty verdict for any one of those four
charges or a verdict of not guilty.

Only guilty of murder one requires a death
penalty. And there are only two alternatives the
Court has: One is death in the electric chair; the
other is life with a minimum mandatory twenty-five
years before the person becomes eligible for parole.
I think a lot of people get the idea that if somebody
gets a life sentence, they get out in seven years.

That isn't the case in a first degree murder. It
does carry a maximum of life, a minimum mandatory of
twenty-five years before a person becomes eligible.
That is the alternative the judge has, one of those
two.

MR. GORDON: Is that the judge's discretion, or
is that by law?

MS. SCHAEFFER: By law, the judge only has two
choices if you return a verdict of murder in the first
degree. Like Mr. Meissner said, you go back and render
an advisory opinion as to what you people believe is
the appropriate sentence, whether you believe that the
appropriate sentence is death or whether you believe



the appropriate sentence is life with a minimum mandatory twenty-five years.

Now, he just doesn't disregard that and do whatever he wants to. He is, by law, required to give your recommendation great weight, but he is also permitted to overrule your recommendation if he desires to do so and he feels under the law he should. But he can still only do one of those two things. The law does not give him any other discretion.

He has to, ultimately, if Mr. Mann is convicted of murder in the first degree, say, I sentence you to death, life, or the minimum mandatory of twenty-five years. That's the only two options he has. Okay? Does that clear that up? Does everybody understand that?

(THEREUPON, the prospective jurors indicated affirmatively.)

MS. SCHAEFFER: Ms. Clow, I didn't understand whether you were now retired or still working.

MS. CLOW: I'm retired.

MS. SCHAEFFER: Okay. Mr. Meissner's experience is broader than mine. What does a Social Security claims representative do, exactly?

MS. CLOW: We interview claimants who come in to file for benefits, for retirement, disability.



1 advisory opinion.

2 If you don't believe that, if you believe the
3 aggravating -- or there is aggravation not outweighed
4 by mitigation, then, by law, you are supposed to return
5 a death decision. And that is advisory only and it
6 goes to the judge. It is not quite -- there are some
7 guidelines there for you. It wouldn't be appropriate
8 for me at this time to go into it, but the judge will
9 at some time.

10 He will give you a lot on one side and a lot on
11 the other for you to consider in determining what will
12 be the appropriate jury recommendation. Okay.

13 MR. GORDON: Okay. May I ask one more question?

14 MS. SCHAEFFER: Certainly.

15 MR. GORDON: I understood what Mr. Meissner
16 stated that we would sit on a two-part trial, that one
17 determines guilt or innocence.

18 MS. SCHAEFFER: That's where I objected. It's
19 not guilt or innocence. It's whether it is guilty or
20 not guilty, either innocent or not proved beyond
21 every reasonable doubt.

22 MR. GORDON: Excuse me. Let me rephrase it.

23 Guilty or not guilty.

24 MS. SCHAEFFER: Right.

25 MR. GORDON: Then you go into a second phase in



1 think should be flagged to the Court before we proceed
2 to voir dire examination.

3 You now know, this is a murder case. You now
4 know that the Defendant is charged with first degree
5 murder. You know that if the jury returns a verdict
6 of guilty of murder in the first degree, that you will
7 be asked to deliberate further after additional
8 evidence and testimony has been given, under some
9 guidelines, in order that you can offer Judge Federico
10 an advisory opinion as to what sentence you think he
11 ought to consider imposing, whether you think there
12 should be a recommendation of mercy or whether you
13 think that the man should be sentenced to the electric
14 chair.

15 My question is, assuming that there is a finding
16 of guilty of murder in the first degree, and assuming
17 that there are sufficient aggravating circumstances
18 presented as to warrant that you recommend the
19 imposition of the death penalty, is there anyone here
20 who is so opposed to that that you could not think
21 you could follow the law and return such a recommendation
22 regardless of what the aggravating circumstances were?

23 Do any of you have that kind of problem with the
24 imposition of the death penalty?

25 (THEREUPON, the prospective jurors indicated



1 twenty-four ears, twelve brains working on the evidence.
2 the twenty-four eyes and the twenty-four ears and the
3 twenty brains working on the evidence are better than
4 one. Will you go back and discuss the case before you
5 voice an opinion, and will you at least listen to what
6 the other members of the jury say?

7 In reaching your verdict, can all of you do that?
8 Without rehashing all of the questions that have been
9 asked before, do any of you as you sit here feel as
10 though you could not render a fair and impartial verdict
11 in this case, either because of your feelings ~~for~~ ~~against~~
12 against the possible imposition of the death ~~penalty~~
13 which, again, is the judge's responsibility, or because
14 of something in your background or the nature of the
15 offense that makes you feel as though without even
16 listening to the evidence, you have your mind made up?

17 All of you feel as comfortable as you can in this
18 situation? Are all of you prepared to do your duty
19 and to look at this Defendant and bring a verdict back
20 to the courtroom and have that verdict speak the truth?

21 MR. DOHERTY: Mr. Dance is indicating his answer
22 is no.

23 MR. MEISSNER: I will get to him.

24 Can all of you do that? Mr. Dance, are you still
25 having problems?



1 MS. RUNEY: Auditing.

2 MEISSNER: All right. Mr. Cooper, any problem
3 with the death penalty as it would relate to your
4 ability to fairly try the issues in this case?

5 MR. COOPER: I don't think so, no.

6 MR. MEISSNER: You understand, I am sure, by now
7 that this is a two phase trial. If the jury returns
8 a guilty of murder in the first degree verdict, you are
9 in the position of hearing additional testimony and
10 evidence; and according to guidelines under the law
11 that is given you by the judge, you would render an
12 advisory opinion to the Court.

13 MR. COOPER: Right.

14 MR. MEISSNER: As this jury is presently
15 constituted, you do understand you do not impose the
16 death penalty. It is authorized by the law in the
17 State of Florida that the Court would impose it should
18 you find the Defendant guilty and should he find it
19 necessary and proper in this case. If not, the
20 alternative is life imprisonment.

21 MR. COOPER: Um-hum.

22 MR. MEISSNER: Mr. Cooper, you are an accountant?

23 MR. COOPER: Yes, sir.

24 MR. MEISSNER: Is that the type of work you have
25 done all of your life?



1 Ms. Schaeffer talk about it and in the context that I
2 have talked about it, that in any way through your
3 opinion or your background or your view of the death
4 penalty that would in any way inhibit your ability to
5 be fair and impartial and return a verdict that the
6 evidence says you should return?

7 (THEREUPON, the prospective jurors indicated
8 negatively.)

9 MR. MEISSNER: You both understand that the
10 ultimate responsibility rests with the Court; that it's
11 not the jury's responsibility?

12 (THEREUPON, the prospective jurors indicated
13 affirmatively.)

14 MR. MEISSNER: Other than to give an advisory
15 opinion if you find him guilty of murder in the first
16 degree?

17 (THEREUPON, the prospective jurors indicated
18 affirmatively.)

19 MR. MEISSNER: Now, Mr. Schlenkerman, you work
20 for Sherwin-Williams?

21 MR. SCHLENKERMAN: Yes.

22 MR. MEISSNER: What did you do for Sherwin-Williams?

23 MR. SCHLENKERMAN: Sherwin-Williams had a large
24 printing plant. I was plant manager.

25 MR. MEISSNER: Do you have any specific training



1 The Defendant is charged by an indictment filed in this
2 case with violations of the laws of the State of Florida
3 relating to murder in the first degree and kidnapping,
4 the elements of which will be explained to you later.

5 It is your solemn responsibility to determine the guilt
6 or innocence of the Defendant, and your verdict must
7 be based solely on the evidence as it is presented to
8 you in this trial and the law in which the Court will
9 instruct you at the close of the trial.

10 The jury is concerned with the facts; the Court
11 is concerned with the law. The Court is concerned
12 with the facts only to see that they are properly and
13 lawfully presented to the jury. The jury is concerned
14 with the law only as the Court instructs them on the
15 law at the close of the trial. Thus, the province of
16 the jury and the province of the Court are well-defined,
17 and they do not overlap. This is one of the fundamental
18 principles of our system of justice.

19 Before proceeding further, it is necessary that
20 you understand how this trial will be conducted. First,
21 the attorneys will have an opportunity to address you;
22 that is, to make opening statements to you, and to
23 outline to you their contentions as to the essential
24 facts in the case in accordance with the evidence which
25 may be admitted during the trial for your consideration



1 1980. We don't know what it is, and we don't know why
2 it happened. But we do know that it hasn't moved and
3 that it's still there with him. He's asked for his
4 , ,
5 day in court, and the people of the State of Florida
6 have given him several days in court. He has afforded
7 himself of a system of justice that gives him the
8 benefit of every reasonable doubt. You have been told
9 and I concur that we have the burden. You have been
10 told and I agree that when he came into this trial,
11 he sat there, clothed in innocence, cloaked in white,
12 having afforded himself of the system, having asked to
13 have judgment passed by twelve people in the community.
14 I ask you, when you file out of the courtroom and
15 deliberate your verdict, is he still clothed in white?

16 The State has done everything that it can do under
17 the system up until this point. You go out, you
18 deliberate your verdict, and you walk back into this
19 courtroom and you tell the Defendant and you tell Judge
20 Federico and you tell the world what you have determined.
21 I submit that if you carefully consider all of the
22 evidence in this case, you'll walk back in with a
23 conviction of guilty as charged of murder in the first
24 degree, guilty as charged of kidnapping. If you do
25 that, we'll reconvene, as we talked about in voir dire.
 The matter of sentencing ultimately rests with the



1 Court. But I ask you to consider the case carefully.
2 When you come back into the courtroom, look at him,
3 give him the justice that he demands of us. Give him
4 the justice that he didn't give to Elisa Nelson.

5 Thank you.

6 THE COURT: Before we hear the final argument of
7 Ms. Schaeffer, we'll take a ten minute recess.

8 (THEREUPON, a short recess was taken.)

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evidence. A well-connected chain of circumstances is
conclusive in proving a crime or fact, as is positive
evidence. Its value is dependent upon its conclusive
nature and tendency. Circumstantial evidence is
governed by the following rules: One, the circumstances
themselves must be proved beyond a reasonable doubt;
two, the circumstances must be consistent with guilt
and inconsistent with innocence; three, the circumstances
must be of such a conclusive nature and tendency that
you are convinced beyond a reasonable doubt of the
Defendant's guilt or of the fact to be proved.

If the circumstances are susceptible of two
reasonable constructions, one indicating guilt and
the other innocence, you must accept that construction
indicating innocence. Circumstances which, standing
alone, are insufficient to prove or disprove any fact
may be considered by you in weighing direct and positive
testimony.

You are to disregard the consequences of your
verdict. You are impaneled and sworn only to find a
verdict based upon the law and the evidence. You are
to consider only the testimony which you have heard,
along with the other evidence which has been received,
and the law as given to you by the Court. You are to
lay aside any personal feeling you may have in favor



1 of, or against, the State and in favor of, or against,
2 defendant. It is only human to have personal
3 feeling or sympathy, in matters of this kind, but any
4 such personal feeling or sympathy has no place in the
5 consideration of your verdict. When you have determined
6 whether the Defendant is guilty or not guilty, you have
7 completely fulfilled your solemn obligation under your
8 oaths.

9 An attorney has the right, and it is his duty, to
10 interview witnesses for the purpose of learning what
11 testimony they will give. The fact that a witness has
12 talked to an attorney and may have told the attorney
13 what he would testify to on the trial does not discredit
14 the testimony of the witness.

15 Your verdict of finding the Defendant either guilty
16 or not guilty must be unanimous. The verdict must be
17 the verdict of each juror, as well as of the jury as
18 a whole.

19 A separate crime is charged in each count of the
20 indictment. Each crime and the evidence applicable to
21 it must be considered separately. The fact that you
22 may find the Defendant guilty or not guilty of one of
23 the crimes charged must not affect your verdict with
24 respect to the other crime charged.

25 Count I of the indictment charges the crime of



1 THE CLERK: Alicia P. Sickler, are these your

2 SICKLER: Yes.

3 THE CLERK: James L. Pendergraft, are these your
4 verdicts?

5 MR. PENDERGRAFT: Yes.

6 THE CLERK: Margaret F. Swauger, are these your
7 verdicts?

8 MS. SWAUGER: Yes.

9 THE CLERK: Alice Tresca, are these your verdicts?

10 MS. TRESKA: Yes.

11 THE CLERK: Michael Peter Lazor, are these your
12 verdicts?

13 MR. LAZOR: Yes.

14 THE CLERK: Cusick P. Clow, are these your verdicts?

15 MS. CLOW: Yes.

16 THE COURT: Members of the jury, as you were
17 informed at the outset of this case, if you should
18 return a verdict of guilty of murder in the first
19 degree, it would be necessary for you to render an
20 advisory opinion to the Court with regard to the
21 punishment the jury feels appropriate in this case.
22 That phase of the trial will commence at nine o'clock
23 tomorrow morning. You will remain sequestered for this
24 evening. Trial will start promptly at that time. At



1 MR. DOHERTY: Number three just says that the jury
2 recommendation is entitled to great weight.

3 THE COURT: Well, I think that goes without saying.
4 I don't know if I need to instruct them that that is
5 so.

6 MR. DOHERTY: I think it is. The reason we would
7 ask --

8 THE COURT: That's something that I need to do
9 after they make their recommendation, and I will give
10 it great weight.

11 MR. DOHERTY: I know, but they need to know that
12 so they know we're not up there just --

13 THE COURT: I think the standard instructions
14 bring home to them that it is very important that they,
15 you know, to not act hastily or without due regard to
16 the gravity of these proceedings, that they should
17 carefully weigh and sift and consider the evidence. I
18 think that's sufficient. I will deny number three.

19 MR. DOHERTY: The next one is with regard to
20 instructing the jury that they have a function that
21 they are serving -- their function is to balance the
22 aggravating and mitigating circumstances, that they are
23 to give each aggravating mitigating circumstance the
24 weight they think it deserves. I think that is not
25 clear in the standard jury instructions. It sounds like



1 specials explaining the aggravating and mitigating
2 circumstances, when appropriate.

3 Some I won't ask for, I'm sure. Here's that top
4 blurb. Here is the first one I have asked for.

5 (THEREUPON, an off-the-record discussion was held.)

6 MR. MEISSNER: If I could see that also -- some
7 I won't have any problem with.

8 MS. SCHAEFFER: This will be two, for the Court.
9 This is one.

10 (THEREUPON, an off-the-record discussion was held.)

11 MR. MEISSNER: We don't have any objection to
12 special instruction number one.

13 THE COURT: You don't?

14 MR. MEISSNER: No.

15 THE COURT: All right. I'll give it, then, since
16 there is no objection from the State. That's granted.

17 I have a problem with number two. I don't really
18 understand its applicability.

19 MR. MEISSNER: I don't, either. I'm going to
20 interpose an objection to it.

21 THE COURT: I'll deny number two. I don't think
22 it's appropriate. That's for avoiding arrest.

23 MR. DOHERTY: Okay.

24 THE COURT: I'll deny that one. I'll give number
25 one.



1 appropriate place?

2 MS. SCHAEFFER: Number one, we said there should be
3 added, that when you're giving A, B, C, D, E, F, G,
4 then you should read that one as H, so that would go
5 right in there.

6 THE COURT: I think all three of those could go
7 right in there.

8 MS. SCHAEFFER: I think they probably could.

9 (THEREUPON, an off-the-record discussion was held.)

10 (THEREUPON, the following proceedings were held in
11 open court.)

12 THE BAILIFF: Your Honor, the jury is in the jury
13 room.

14 THE COURT: Bring the jury back, Mr. Devens.

15 THE BAILIFF: The jurors are in the jury box.

16 THE COURT: Thank you. Good morning, ladies and
17 gentlemen. Members of the jury, you have found the
18 Defendant guilty of murder in the first degree. The
19 punishment for this crime is either death or life
20 imprisonment. The final decision as to what punishment
21 shall be imposed rests solely with the judge of this
22 court. However, the law requires that you, the jury,
23 render to the Court an advisory sentence as to what
24 punishment should be imposed upon the Defendant. The
25 State and the Defendant may now present evidence relative

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1 to what sentence you should recommend to this Court.
2 You are instructed that this evidence, when considered
3 with the evidence you have already heard, is presented
4 in order that you might determine, first, whether or
5 not sufficient aggravating circumstances exist which
6 would justify the imposition of the death penalty; and
7 secondly, whether there are mitigating circumstances
8 sufficient to outweigh the aggravating circumstances,
9 if any. At the conclusion of the taking of the evidence
10 and after argument of counsel, you will be instructed
11 on the factors in aggravation and mitigation that you
12 may consider.

13 At this time, I will allow counsel a brief opening
14 statement. Does the State wish to make one?

15 MR. HART: No, sir.

16 THE COURT: You're waiving?

17 MR. HART: Yes, sir.

18 THE COURT: The defense may make a brief opening
19 statement.

20 MS. SCHAEFFER: All right. It's very important,
21 before we begin this phase, that you understand the
22 responsibility, the duties and ethics of a criminal
23 defense attorney. I tell you this because you are now
24 going to learn that throughout the beginning, or
25 throughout, the first phase of the trial, both Mr.



1 has been scarred by what this Defendant did to her?

2 [REDACTED] the defendant's mother, his family, they are all victims.

3 Donna Mann, a victim. They are victims only because
4 they had contact with the Defendant. Every one of those
5 individuals, Donna Mann, the Defendant's family, had
6 an opportunity to come in under the protection of the
7 law that every one of us in this courtroom stands
8 ready to uphold; to sit in that witness stand and ask
9 you to spare his life.

10 There are other victims in this case, the parents
11 of Elisa Vera Nelson who have never had the opportunity
12 to stand in front of anyone and ask to have their
13 daughter's life spared. What I'm suggesting to you is
14 that the ultimate responsibility for the imposition of
15 the sentence rests with Judge Philip Federico. That
16 is his sworn position in the system. He's heard
17 everything you have heard. He may have the opportunity
18 to learn more before he imposes a sentence. I think
19 this community, as represented by this jury, should give
20 to him the prerogative of imposing the death penalty,
21 if that's what he ultimately feels is required in this
22 case. Thank you.

23 MR. DOHERTY: If it please the Court, ladies and
24 gentlemen of the jury, I want to thank you for the
25 attention you have paid throughout the course of this



1 to have people coming to see him. So, I don't know
2 which is worse, to tell you the truth. But as Mr.
3 Doherty says, he has not forfeited his right to live
4 any more than Elisa Nelson did. He is a sick man.
5 You heard that from the psychiatrist. The man is sick.
6 What causes a man to have an interest in little children,
7 I don't know. I just don't know. I don't understand
8 it. But apparently he does. ~~He's sick.~~ He's as sick
9 as he can be. He deserves to be put away for the rest
10 of his life, but a sick man does not deserve to be
11 executed. He has not forfeited his right to live. Mr.
12 Doherty and I implore you. This is the part I hate,
13 because I don't like to beg anybody for anything,
14 because I'm begging you with everything I have got, to
15 spare his life.

16 THE COURT: I would ask that if anyone wishes to
17 leave the courtroom, to please do so now and not during
18 the Court's instructions to the jury.

19 These instructions, ladies and gentlemen, will
20 take about ten minutes. If you wish to stand in place
21 for a moment, that's fine before we begin.

22 Ladies and gentlemen of the jury, it is now your
23 duty to advise the Court as to what punishment should
24 be imposed on the Defendant for his crime of murder in
25 the first degree. As you have been told, the final



1 decision as to what punishment shall be imposed is the
2 responsibility of the judge. However, it is your duty
3 to follow the law which will now be given to you by the
4 Court and render to the Court an advisory opinion based
5 upon your determination as to whether sufficient
6 aggravating circumstances exist to justify the imposition
7 of the death penalty, whether sufficient mitigating
8 circumstances exist to outweigh any aggravating
9 circumstances found to exist. Your verdict should be
10 based upon the evidence which you have heard while
11 trying the guilt or innocence of the Defendant, and
12 evidence which has been presented to you in this
13 proceeding.

14 The aggravating circumstances which you may consider
15 are limited to such of the following as may be established
16 by the evidence: A, that the crime for which the
17 Defendant is to be sentenced was committed while the
18 Defendant was under sentence of imprisonment; B, that
19 at the time the crime for which he is to be sentenced,
20 the Defendant had been previously convicted of another
21 capital offense or of a felony involving the use or
22 threat of violence to some person; C, that the Defendant
23 in committing the crime for which he is to be sentenced,
24 knowingly created a great risk of death to many persons;
25 D, that the crime for which the Defendant is to be



You are required to use a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. The procedure, therefore, shouldn't be viewed as a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances.

In order that you might better understand and be guided concerning the manner in which you should consider the enumerated aggravating circumstances, the Court instructs you that the aggravating circumstances specified in these instructions are exclusive. In deciding whether or not to recommend the death penalty, no other factor or circumstance may be used as an aggravating circumstance, although you may consider anything in mitigation and not just those previously enumerated by me. Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision.

Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding judgment and reason of the jury are well-satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt. Evidence



1 to have people coming to see him. So, I don't know
2 which is worse, to tell you the truth. But as Mr.
3 Doherty says, he has not forfeited his right to live
4 any more than Elisa Nelson did. He is a sick man.
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6 What causes a man to have an interest in little children,
7 I don't know. I just don't know. I don't understand
8 it. But apparently he does. He's sick. He's as sick
9 as he can be. He deserves to be put away for the rest
10 of his life, but a sick man does not deserve to be
11 executed. He has not forfeited his right to live. Mr.
12 Doherty and I implore you. This is the part I hate,
13 because I don't like to beg anybody for anything,
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17 leave the courtroom, to please do so now and not during
18 the Court's instructions to the jury.

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20 take about ten minutes. If you wish to stand in place
21 for a moment, that's fine before we begin.

22 Ladies and gentlemen of the jury, it is now your
23 duty to advise the Court as to what punishment should
24 be imposed on the Defendant for his crime of murder in
25 the first degree. As you have been told, the final



1 you to act hastily or without due regard to the gravity
2 of these proceedings. Before you ballot, you should
3 carefully weigh, sift and consider the evidence, and
4 all of it, realizing that a human life is at stake, and
5 bring to bear your best judgment upon the sole issue
6 which is submitted to you at this time, of whether a
7 majority of your number recommend that the Defendant
8 be sentenced to death or to life imprisonment. Should
9 a majority of the jury determine that the Defendant
10 should be sentenced to death, you should recommend an
11 advisory sentence as follows: "A majority of the jury
12 advises and recommends to the Court to impose the death
13 penalty upon the Defendant, Larry Eugene Mann." On
14 the other hand, if after considering all the law and
15 the evidence touching upon the issue of punishment, a
16 majority of the jury determines that the Defendant
17 should not be sentenced to death, then you should render
18 an advisory sentence as follows: "A majority of the
19 jury advises and recommends to the Court that it impose
20 a sentence of life imprisonment upon the Defendant,
21 Larry Eugene Mann." The law requires that seven or
22 more members of the jury agree upon any recommendation,
23 advising either the death penalty or life imprisonment.
24 You will now retire to consider your recommendation;
25 and when seven or more are in agreement as to what

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1 advisory sentence which you have just heard read by the
2 Clerk?

3 MR. LAZOR: I do.

4 THE CLERK: Do you, Cusick P. Clow, agree and
5 confirm that a majority of the jurors joins in the
6 advisory sentence which you have just heard read by the
7 Clerk?

8 MS. CLOW: I do.

9 THE COURT: I would like to join Mr. Lazor in
10 complimenting all of the attorneys who were engaged in
11 the trial of this case in the excellent manner in which
12 they tried the case and the professional ability and
13 professionalism displayed by all counsel in this matter.

14 With regard to the jury, the Court realizes that
15 jury service is an imposition to some extent upon all
16 who are called to serve. It is particularly an imposition
17 upon jurors who are required to be sequestered. However,
18 the law is paramount. We certainly recognize your
19 dedication and appreciate your cooperation during your
20 week of jury service. You are now excused with the
21 thanks of the Court, and your week of jury service is
22 concluded. Thank you very much.

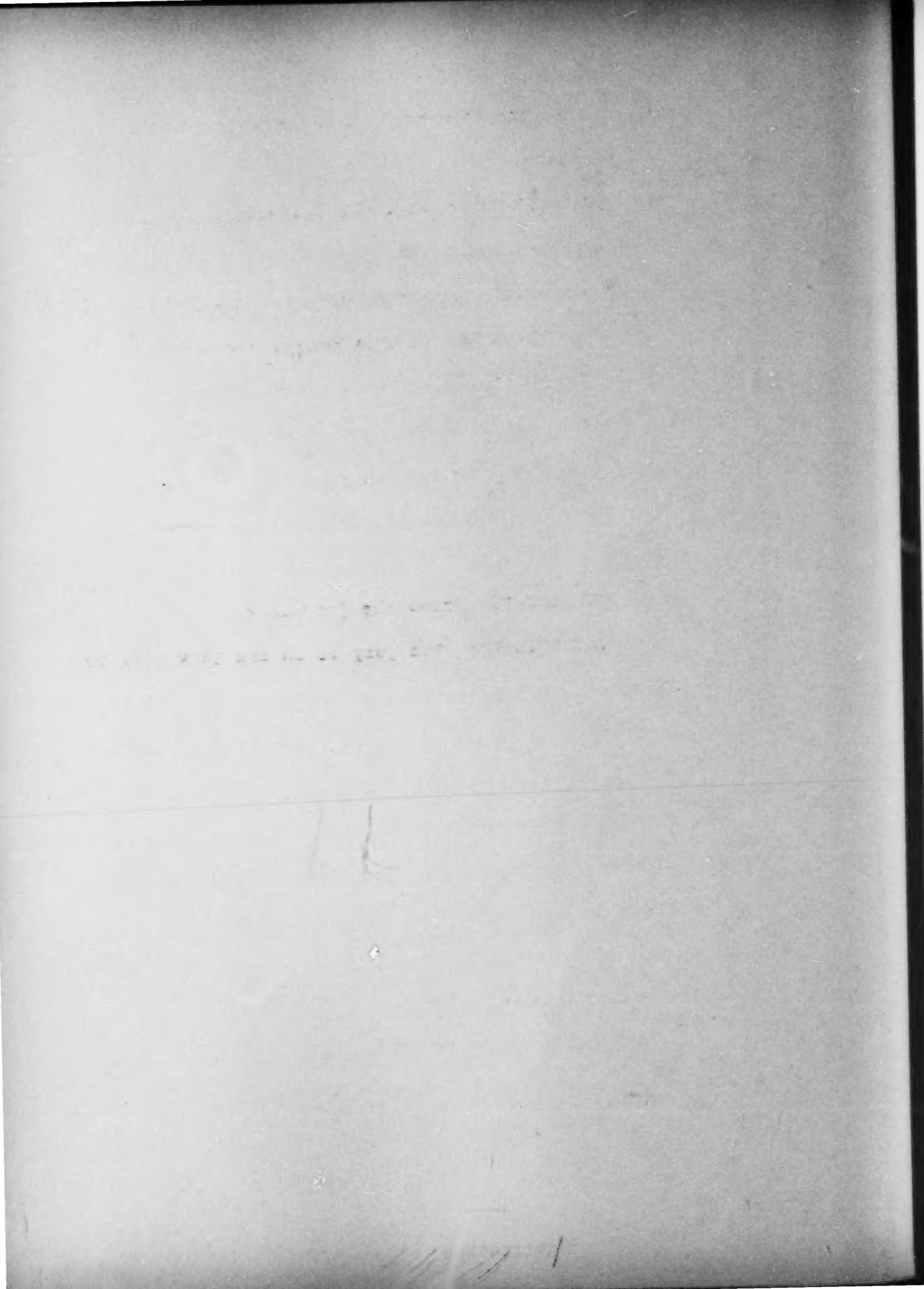
23 THE BAILIFF: The jury has left the courtroom.

24 THE COURT: The Court, as required by law, will
25 give great weight to the recommendation of the jury and

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APPENDIX B



1 Q You have seen them, haven't you?

2 A I have.

3 THE COURT: Anything else, Mr. Meissner?

4 MR. MEISSNER: No, Judge.

5 THE COURT: Anything else for the Defendant?

6 MR. DOHERTY: At this point, the defense would rest.

7 THE COURT: We'll take a ten minute recess, and
8 then we'll commence final arguments to the jury.

9 (THEREUPON, a short recess was taken.)

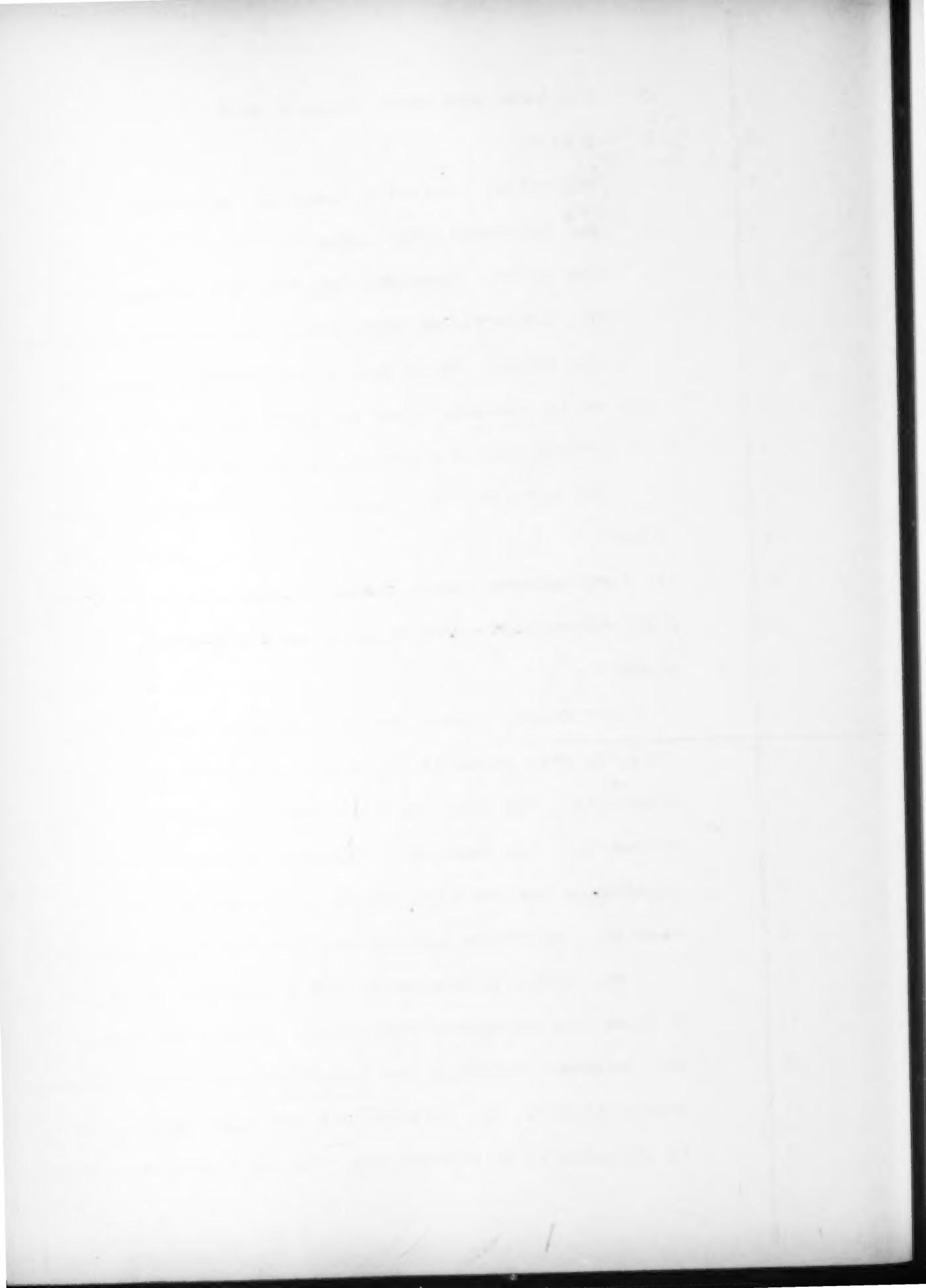
10 THE BAILIFF: The jury is in the jury room, Your
11 Honor.

12 THE COURT: Bring the jury back.

13 THE BAILIFF: The jury is in the jury box, Your
14 Honor.

15 THE COURT: Thank you, Mr. Devens. Members of the
16 jury, in this phase of the trial we'll have two final
17 arguments: One from the State and one from the defense.
18 Thereafter, the Court will instruct you on the law
19 applicable and you will retire to deliberate your
20 verdict. The State may proceed with its final argument.

21 MR. HART: I have never had an opportunity to
22 address you throughout this trial. During voir dire,
23 Mr. Meissner conducted the entire jury selection process.
24 During closing, Mr. Meissner was the only one who had
25 an opportunity to address you. He and I will each speak



1 to you. He will speak after I am finished, and Ms.
2 Schaeffer and Mr. Doherty will have an opportunity to
3 speak with you.

4 First of all, I want to offer you my personal
5 thanks for your diligence. Each of you during this
6 trial -- I'm very satisfied that you have done service
7 to the community; you have done justice by the victim
8 in this case. You have seen diligently to the laws of
9 this state, seen that they have been applied in a fair
10 and consistent manner as required by the Constitution
11 of this country and the state. I'm sure that each of
12 you must feel very comfortable with the decision that
13 you reached last evening. The judge is going to
14 instruct you on what are called aggravating and mitigating
15 circumstances. He is going to tell you, basically, that
16 you have to assess or evaluate the aggravating circum-
17 stances in this case, weigh them against the mitigating
18 circumstances in this case; and after looking at them
19 individually, looking at them as a whole, balancing them
20 out, you must make a decision. A decision is based on
21 a majority vote, not like the decision of guilt or
22 innocence, where everyone must agree. This decision
23 and recommendation will be based on what a majority
24 feels, given all the considerations under the law.
25 The judge is going to talk about aggravating circumstances.

1 He is going to mention six or seven of them. I feel at
2 this point in the trial that we're dealing with four of
3 the seven; that is, that the Defendant was previously
4 convicted of another capital felony or a felony involving
5 the use or threat of violence to a person. The State
6 brought in from Texas the victim of this man's propen-
7 sities as they existed in 1973. You saw Debra Johnson,
8 you heard her testimony as to what she did to him. And
9 interestingly enough, as far back as 1973, this man,
10 even though he performed this sex act upon her, targeted
11 and made mention of the fact that if she did not
12 satisfy his desires, that the young -- I think she said
13 a two year old boy that was crying and watching this
14 going on, he would have been the target that he would
15 have selected to satisfy his desires. Interestingly
16 enough, I think if you go back to 1973, that the two
17 year old boy today is around eleven years old, about
18 the age of Elisa Vera Nelson.

19 Now, you have also considered the crime of
20 kidnapping in this particular case. We know that we're
21 dealing here with an individual who is a convicted
22 burglar; who we absolutely know has committed a violent
23 sex act upon another female in the community without
24 question; and the community, meaning this country, and
25 has threatened violence to a young two year old child

24.0



1 during the course of that transaction. We know that
2 there was an incident back in 1969 involving a seven
3 year old girl. Where she is today, I know not; but she
4 is a twenty year old person living somewhere in this
5 country. And I imagine if we had the records and the
6 resources, we could go back and find her. We could give
7 you the name of that victim. Let's just call her Jane
8 Doe. We know the name of the '73 victim, Debra Johnson;
9 and we know the name of the 1980 victim, Elisa Vera
10 Nelson. What we don't know, if this man is ever eligible
11 for parole, is who the victim will be in twenty-six
12 years, possibly. It is apparent that the reason Elisa
13 Vera Nelson was a victim, was because she witnessed or
14 could have been the person that identified him as her
15 abductor had she lived. That, I believe, is the second
16 aggravating factor here. The capital felony was
17 committed for the purpose of avoiding or preventing a
18 lawful arrest or effecting an escape from custody. It
19 is the State's contention that this murder was committed
20 so that there would be no witnesses to the act that this
21 man committed.

22 The fourth factor that this case obviously falls
23 into is the capital felony was especially heinous,
24 atrocious and cruel; and I want to talk about that for
25 just a few moments. We did not show you everything



1 that was available. We can only show you those items
2 that were permitted into evidence, those items which
3 were found to be more relevant than inflammatory. I
4 am not going to sit up here and spend a lot of time
5 trying to get you enraged or pumped up over the murder
6 of this girl, but there is no question based on the
7 Medical Examiner's testimony that over half the body
8 or over half the blood in the body of that girl pumped
9 from her neck before she died. Where did it go? Well,
10 we heard testimony that there were blots, I think, ten
11 or twelve, up to eighteen feet away. There was a ~~rip~~
12 trail several feet away, and there were no drag ~~marks~~.
13 Let me suggest to you that it indicates that at some
14 point, Elisa Vera Nelson was on the ground; that her
15 hair was pulled back and her throat was slashed and
16 that she tried to crawl away. She tried to get away,
17 but obviously being a ten year old girl, she was unable
18 to overpower this man or elude him under any circumstances,
19 and that she literally crawled around on her hands and
20 knees in that area trying to pull away from him, bleeding
21 from the throat. Look at the clothes. Those clothes
22 are not that badly stained. Had she been standing or
23 upright, the blood from her neck would have covered her.
24 Let me suggest to you that is what happened in this
25 case. Let me also suggest that prior or at some point,

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1. *Leucosia* (L.) *leucostoma* (L.)

2. *Leucosia* (L.) *leucostoma* (L.)

3. *Leucosia* (L.) *leucostoma* (L.)

4. *Leucosia* (L.) *leucostoma* (L.)

5. *Leucosia* (L.) *leucostoma* (L.)

6. *Leucosia* (L.) *leucostoma* (L.)

7. *Leucosia* (L.) *leucostoma* (L.)

8. *Leucosia* (L.) *leucostoma* (L.)

9. *Leucosia* (L.) *leucostoma* (L.)

10. *Leucosia* (L.) *leucostoma* (L.)

11. *Leucosia* (L.) *leucostoma* (L.)

12. *Leucosia* (L.) *leucostoma* (L.)

13. *Leucosia* (L.) *leucostoma* (L.)

14. *Leucosia* (L.) *leucostoma* (L.)

15. *Leucosia* (L.) *leucostoma* (L.)

16. *Leucosia* (L.) *leucostoma* (L.)

17. *Leucosia* (L.) *leucostoma* (L.)

18. *Leucosia* (L.) *leucostoma* (L.)

19. *Leucosia* (L.) *leucostoma* (L.)

20. *Leucosia* (L.) *leucostoma* (L.)

21. *Leucosia* (L.) *leucostoma* (L.)

22. *Leucosia* (L.) *leucostoma* (L.)

23. *Leucosia* (L.) *leucostoma* (L.)

24. *Leucosia* (L.) *leucostoma* (L.)

25. *Leucosia* (L.) *leucostoma* (L.)

26. *Leucosia* (L.) *leucostoma* (L.)

27. *Leucosia* (L.) *leucostoma* (L.)

28. *Leucosia* (L.) *leucostoma* (L.)

29. *Leucosia* (L.) *leucostoma* (L.)

1 this man began to tie her up -- and I think, given the
2 testimony you have heard in this case and the way this
3 man is with children, that his intentions were to
4 sexually molest her, but she was able to resist. He
5 abandoned the effort; and when she tried to get away,
6 he cut her throat. I can't show you a picture of Elisa
7 Vera Nelson. This is not a picture of Elisa Vera Nelson.
8 It's a picture of the body of Elisa Vera Nelson. Elisa
9 Vera Nelson was gone at this time.

10 X Let's reconstruct possibly what she did with her
11 life. You've seen her mother. You've seen the young
12 girl's hair, long, blond. You might imagine, based on
13 a couple of pictures you have seen, she was a fair-
14 complexioned, light-skinned young girl who had just got
15 her braces when she was on the way to school. Let's
16 leave it at that.

17 The last category is, the capital felony was a
18 homicide and was committed in a cold, calculated and
19 premeditated manner without any pretense of moral or
20 legal justification. I believe this is abundantly
21 applicable. What did this girl do? What could she
22 conceivably have done to motivate or to call for this
23 response? This is not a case where an enraged lover or
24 an enraged husband went out to get his wife's lover,
25 that there was some feeling of moral justification.

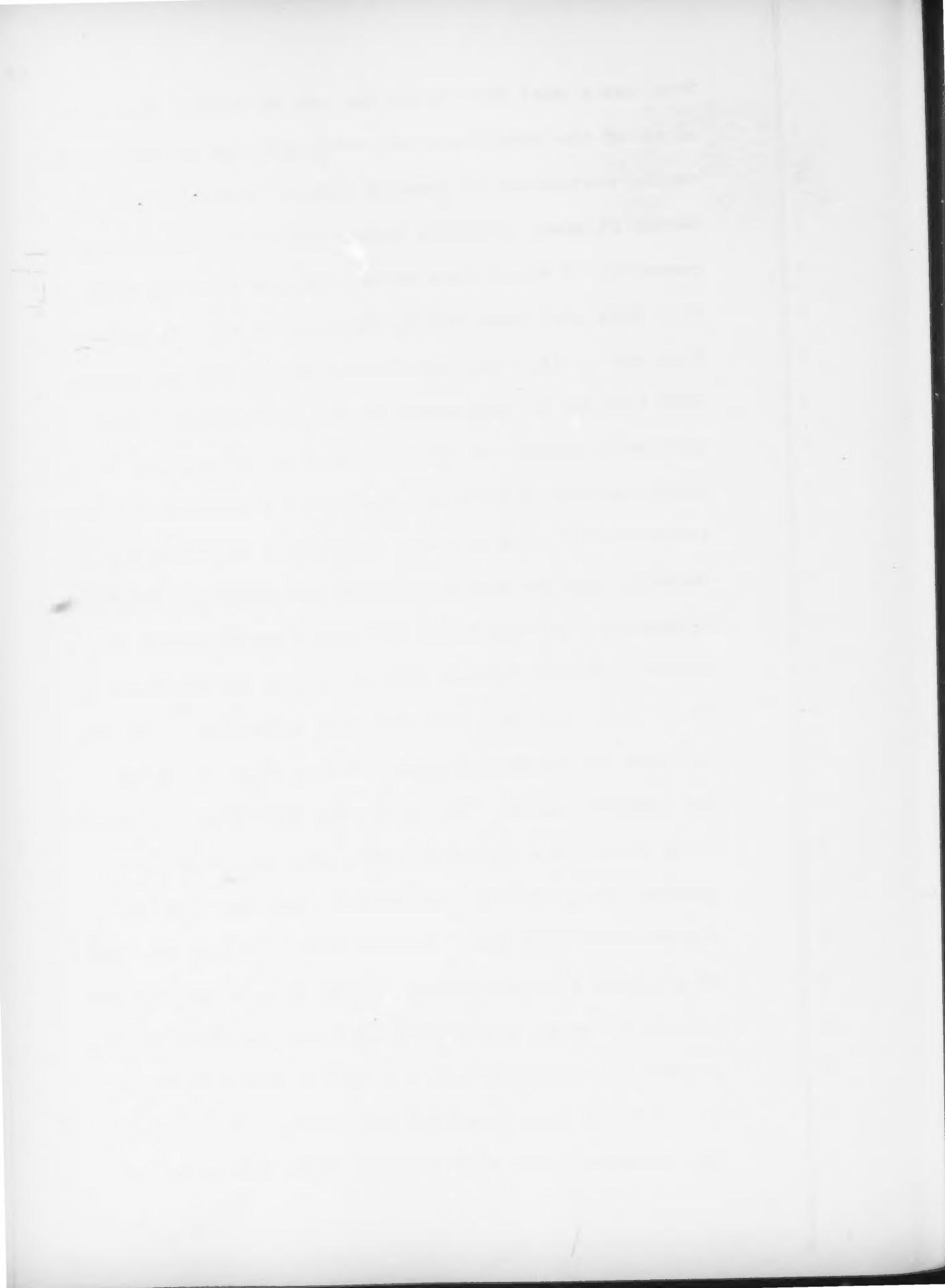


1 This was a girl who was on her way to school four miles
2 north of the home where the Defendant was at and had no
3 reason whatsoever to come in contact with this man.

4 Doctor Fireman, I think, made a couple of interesting
5 comments. I think that would indicate that the most
6 that this girl ever did to this man -- and I'm quoting
7 from him -- is, "She interrupted him." Doctor Fireman
8 said that he had set about or set in his mind a plan
9 that would result in his suicide. He had decided to
10 commit suicide before he committed the offense, but was
11 interrupted by the victim. Elisa Vera Nelson was
12 murdered because she interrupted the plans of the
13 Defendant. Is that moral or legal justification? It's
14 absurd. Doctor Fireman went on to say and describe the
15 young girl, and this was even more offensive, I think,
16 in light of everyone's common sense, that he lashed
17 out against, quote, "the provoking individual." Remember
18 those terms from Doctor Fireman, that he lashed out
19 against the provoking individual? And here she is.
20 She provoked this man. I think that flies in the face
21 of everyone's common sense. Elisa Vera Nelson did not
22 provoke anybody. Maybe from some sort of theoretical,
23 conceptual, psychological standpoint that's what she
24 is. But you know from your own common experience in
25 this community and with children that this is not a

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provoking individual.

Talking about the atrociousness and the cruelty and the heinousness of this offense, I want to point out to you -- I don't think there is any question about that. Throughout the voir dire process, I remember Ms. Schaeffer and Mr. Doherty continually asked you if you would be so upset by gruesome photographs, grisly photographs, gruesome, ghastly, hideous -- all those words I recall being used by defense counsel to describe the photographs that you would see. Those words are the words of the statute: Heinous, atrocious and cruel. I don't think there is any question but that defense counsel has conceded to you in voir dire and throughout this trial the word they have chosen to describe the things that you have seen. These are and this is one of those crimes that is heinous, atrocious and cruel.

Some people say the death penalty should not be imposed because it doesn't deter others from committing a crime. I'm not concerned with that today. It doesn't affect me today. The State of Florida, the people of the state that Mr. Meissner and I work for are not concerned about deterring others today. Certainly if this was a side effect of the penalty that we could be assured of, we would be happy that it existed. But that



is not our purpose here today. We're asking that you
recommend this man be given the death penalty to deter
only one person in the world, and that's Larry Eugene
Mann. I can't be concerned about the theory of whether
or not somebody in years to come is going to be deterred
by Mr. Mann's execution. I don't know if that's going
to happen, and I don't want Mr. Mann executed for that
reason. The State wants Mr. Mann put to death because
the State cannot afford for this man to remain alive.

We know of three victims. Doctor Fireman indicated in
his testimony that he talked about other criminal
episodes with the Defendant that we don't know about.
This community cannot afford for this man to remain
alive. This man does not deserve to remain alive; and
if justice in this country is to have any value at all,
it seems to me that the penalty that's given ought to
in some way approach the crime that was committed.

This picture of this scene that you viewed with
the body of Elisa Vera Nelson was the scene that was
created by what exists in this man and what has existed
in this man as far back as 1969, what existed in him
from the day he went into Debra Johnson's home and what
existed in what this young child died for not five
months ago. I suggest to you that in the last eleven
years, this man has not changed. We can sit around and



1 theorize and hope that somewhere in the future somebody
2 might come up with a cure. But as Ms. Schaeffer and Mr.
3 Doherty pointed out in some of their cross-examination
4 of some of the witnesses, maybe it will and maybe it
5 won't; and at this juncture, the evidence is so
6 overwhelming that this man is a murder waiting to
7 happen. There is another murder wrapped up in this man
8 right now and maybe more. And by your recommendation,
9 you're going to tell the judge that you as the conscience
10 of this community, you're going to tell him whether or
11 not you are willing to take the risk that at some point
12 in the future this man might be put out in the streets
13 and then be given the opportunity to find out if that
14 murder will occur. I implore you as the conscience of
15 this community to tell the judge to reflect your common
16 sense and what you know to be right in this case, to
17 recommend that Larry Eugene Mann be put to death in the
18 electric chair. Thank you.

19 MR. MEISSNER: Ms. Schaeffer has testified in this
20 portion of the trial and I have not. I will share with
21 you this morning that I have been involved in the
22 criminal justice system for about sixteen years, four
23 years as an FBI agent and twelve years prosecuting,
24 practicing law in this county. You are a part of the
25 criminal justice system that has existed in substantially

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1 the same form you see it today for those sixteen years.
2 What you have seen in this courtroom is but one notable
3 failure of the system. When that judge sentenced Larry
4 ~~Mann to nine years in prison in the State of Mississippi~~
5 for what he did, he expected Larry Mann to be kept for
6 ~~nine years away from society~~. Had the bureaucrats kept
7 him for that period of time, had the law of the State
8 of Mississippi required that he be kept for that period
9 of time, we could not be here today. The state of the
10 law today is that if he receives the death penalty --
11 if he receives life imprisonment, he must serve
12 twenty-five years without parole. But you and I do
13 not control the destiny of the future course of the
14 law. I am not asking you to speculate upon that. I
15 am simply asking you to consider that. How does the
16 system effectively deal with the pathological killer?
17 I don't know. If you think his life should be preserved
18 as an object of medical science and research for
19 individuals like Doctor Fireman to study and you think
20 that's justification for imposing life imprisonment
21 in this case, fine, recommend to the judge that that
22 be done. Does it really make any difference, however,
23 where Larry Mann is, whether he is alive in jail or
24 whether he is out on the streets; if he is alive, he
25 will have access to other human beings; and if he is



1 within reach of a human being, the next time the time
2 bomb goes off and he has this uncontrollable urge, is
3 there any doubt in your mind as to what the result will
4 be? We don't have any effective way of dealing with
5 this Defendant other than to say that we have had
6 enough; you have been given enough opportunities.) You
7 cannot live among us any longer. This has been a long,
8 laborious process that this defendant has been exposed
9 to, a lengthy and thorough police investigation, the
10 charging process by twenty-three citizens, impartial
11 citizens of this county, the discovery process in which
12 two very competent and able attorneys represent him and
13 represent his interests, a long trial period in which
14 it should be obvious to you that throughout, he had the
15 benefit of any doubt and was protected by the law of
16 this state from having his rights trampled upon by the
17 people of the state. That portion of the process is
18 over, and the guilt which we knew about all along has
19 been established now in the eyes of the law, because
20 you were convinced beyond a reasonable doubt of his
21 guilt. You obviously didn't know everything when you
22 retired to determine his guilt. Elisa Nelson is the
23 victim in this case and she's dead. Debra Johnson was
24 a victim in 1973. And is there any doubt in any one of
25 your minds that for as long as that woman lives, she



1 has been scarred by what this Defendant did to her?

2 The Defendant's mother, his family, they are all victims.

3 Donna Mann, a victim. They are victims only because
4 they had contact with the Defendant. Every one of those
5 individuals, Donna Mann, the Defendant's family, had
6 an opportunity to come in under the protection of the
7 law that every one of us in this courtroom stands
8 ready to uphold; to sit in that witness stand and ask
9 you to spare his life.

10 There are other victims in this case, the parents
11 of Elisa Vera Nelson who have never had the opportunity
12 to stand in front of anyone and ask to have their
13 daughter's life spared. What I'm suggesting to you is
14 that the ultimate responsibility for the imposition of
15 the sentence rests with Judge Philip Federico. That
16 is his sworn position in the system. He's heard
17 everything you have heard. He may have the opportunity
18 to learn more before he imposes a sentence. I think
19 this community, as represented by this jury, should give
20 to him the prerogative of imposing the death penalty,
21 if that's what he ultimately feels is required in this
22 case. Thank you.

23 MR. DOHERTY: If it please the Court, ladies and
24 gentlemen of the jury, I want to thank you for the
25 attention you have paid throughout the course of this



APPENDIX C



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2
3
4 MR. DOHERTY: We have previously objected to a
viewing of the scene; we don't want to waive anything
by our failure to object here at the scene. So, for
that purpose, we are objecting to the view.

5 MS. SCHAEFFER: Of everything, of all five places.
6 We are at the first one now. Every place we'll go,
7 we'll object each time.

8 THE COURT: The objection is overruled.

9 The record should reflect that the Defendant has,
10 in fact, waived his presence at each of these jury
11 views.

12 MS. SCHAEFFER: That's correct.

13 MR. DOHERTY: That's correct.

14 THE COURT: Members of the jury, I would, once
15 again, ask you, please, not to talk amongst yourselves
16 in connection with this case. We'll be here briefly,
17 and we'll move on to another location.

18 Also, if you have any inadvertent contact with
19 anyone not involved in the case, please do not allow
20 them to say anything to you or in your presence at all.

21 Mr. Meissner?

22 Q (By Mr. Meissner) Officer Pondakos, you're still
23 under the oath that was administered back in the courtroom.

24 A Yes, sir.

25 Q As the case agent in this case, did you have



1 occasion to locate the home of the victim's parents and the
2 [REDACTED] the victim was living on November fourth, 1980?

3 A Yes, sir. The address is 1930 Florida Avenue,
4 Palm Harbor.

5 Q Are we at that location at this time?

6 A Yes, sir. 1930 Florida Avenue is the house located
7 right there beyond the trees.

8 Q The house to which the officer is pointing is the
9 house where the victim's parents are now living in.

10 Officer Pondakos, is that located within the limits
11 of Pinellas County, Florida?

12 A Yes, sir.

13 Q Now, based upon the investigation that was
14 conducted and the reports you reviewed, are you aware of
15 the location where Mrs. Underwood has testified and previously
16 indicated she last saw the victim alive?

17 A Yes, sir, I'm familiar with that.

18 Q Can you take us and point out that location.

19 A That's correct, I can do that.

20 MR. MEISSNER: Your Honor, I request we now
21 adjourn and move to that location.

22 THE COURT: Any questions in connection with this
23 location?

24 MR. DOHERTY: Not at this time, Your Honor.

25 (THEREUPON, all proceedings were concluded until



1 all parties reached the next scene.)

2 THE COURT: Our jury is present.

3 Q (By Mr. Meissner), Officer Pondakos, would you
4 point out for the jury the place where Mrs. Underwood
5 explained to you was the last place she saw Elisa Nelson,
6 please.

7 A It would most likely be in the area we're standing
8 right now. This is Seventeenth Street and Nebraska Avenue.
9 She was last seen at this intersection traveling toward the
10 west.

11 Q What was her direction of travel?

12 A Toward the west.

13 Q West would be that way?

14 A Yes.

15 Q The sidewalk only on one side of the street would
16 be on the south side of the street?

17 A That's correct, and the sidewalk goes from this
18 location up to Nineteenth.

19 MR. MEISSNER: Do you have any cross-examination?

20 MR. DOHERTY: Not at this time.

21 MR. MEISSNER: I suggest we adjourn from here and
22 go to the location where the bicycle was found.

23 THE COURT: All right. We'll do that.

24 (THEREUPON, all proceedings were concluded until
25 all parties reached the next scene.)



1 Q (By Mr. Meissner) Officer Pondakos, go ahead, if
2 you will, and explain to the jury where the bicycle was,
3 and go ahead and generally describe how this area appeared
4 back on this date, November fourth.

5 MS. SCHAFFER: We object. I thought the idea was
6 to show where the location was and nothing further.

7 MR. MEISSNER: While we're here, I thought that
8 we could explain if there was anything different about
9 this location.

10 THE COURT: Let's pinpoint where this is.

11 THE WITNESS: The bicycle was located -- Elisa's
12 bicycle was located about right where I'm standing. It
13 was tilted over and in the brush.

14 Q (By Mr. Meissner) I'm going to show you what's
15 been marked as State's Exhibit Ten in evidence. Can you
16 identify that photograph?

17 A This is the bicycle that was later identified as
18 belonging to Elisa Nelson.

19 Q Okay. Was that bicycle appearing in that photograph
20 in the spot you're now standing?

21 A Right.

22 Q Is there anything different about that spot than
23 it appeared the day that photograph was taken, on the fourth
24 of November?

25 A This entire area that is cleared, that you see



1 clear here, resembled more like that area there than it does
2 all heavy brush.

3 area where you identified the bicycle as being
4 placed back over here, as resembled now is not the same as
5 it was when it was photographed?

6 A When it was photographed, this entire area was --
7 it resembled the area behind me. This was all covered with
8 heavy brush, and the bicycle was laying in the bushes.

9 Q Officer Pondakos, over here to the right, I notice
10 a house under construction. Did you note that house or the
11 construction of that house on November fourth?

12 A Yes. The house that we're looking at now is in
13 the same condition or the same general condition, construction-
14 wise, as it was back on November fourth, 1980.

15 MR. MEISSNER: I don't have anything further.

16 MR. DOHERTY: We have nothing at this time.

17 MR. MEISSNER: At this time, we'll move to the
18 scene where the body was located.

19 (THEREUPON, all proceedings were concluded until
20 all parties reached the next scene.)

21 THE COURT: All right. I think we can proceed.

22 Q (By Mr. Meissner) Officer Pondakos, would you
23 please mark the spot where the body was located.

24 A Elisa's head was situated in this little hole.

25 Q Speak this way, please.



1 A The victim's head was situated in this hole right
2 here. Right now, there are leaves in it, but her head was
3 in here. The rest of her body came back this way, right
4 about here. She was face down, one arm behind her back, one
5 almost underneath the front of her.

6 MR. MEISSNER: Okay. Susan, if you would come over
7 here and take a look at this. I want to get him to
8 identify the scene in the picture. I just need one of
9 those; whichever you think is most accurately going to
10 give them a good shot of the position. I have a couple
11 of them here. I want to get the angle right.

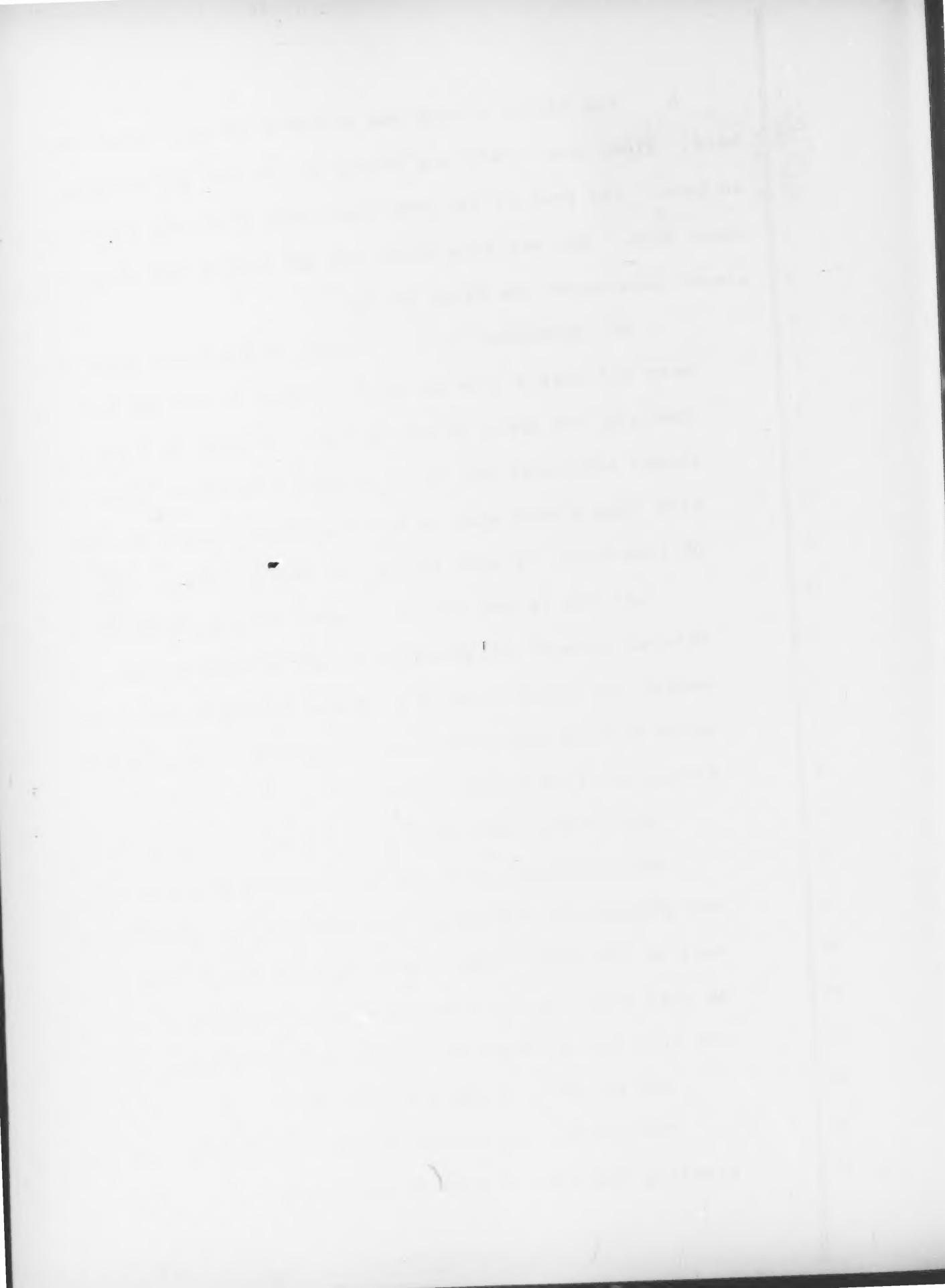
12 Let the record reflect, Judge, I have shown
13 defense counsel two photographs out of what's been
14 marked for identification as State's Exhibit Five. I'm
15 going to have the Clerk mark those Five-A and Five-B.
16 Excuse me, Five-D and Five-E.

17 THE COURT: Very well.

18 MR. MEISSNER: I'll let Officer Pondakos look at
19 the photographs and orient the body and the items laying
20 next to the body. Then I will publish that to the jury
21 so that they can get a visual picture of exactly where
22 the body was situated while they are here, Judge.

23 THE WITNESS: I can identify --

24 THE COURT: Let's move around a little bit. We're
25 blocking the view of some of the jurors.



1 THE WITNESS: These are the photographs that were
2 the day that Elisa's body was found in its
3 position prior to any crime scene investigation
4 being conducted. There is an item in one of the
5 photographs, Five-E, next to her body which is a
6 galvanized pipe pole with a rather large chunk or
7 piece of concrete attached to it. This item was
8 located next to Elisa's head.

9 As I indicated earlier, her head was right here,
10 but the pole with the chunk of concrete was right here
11 with the pole extending back this way. That's ~~supposed~~ pictured
12 in this photograph.

13 Q (By Mr. Meissner) Where would the photographer
14 have been standing, what angle, to take that photo, so we
15 can orient the jury?

16 A About where I'm standing right now.

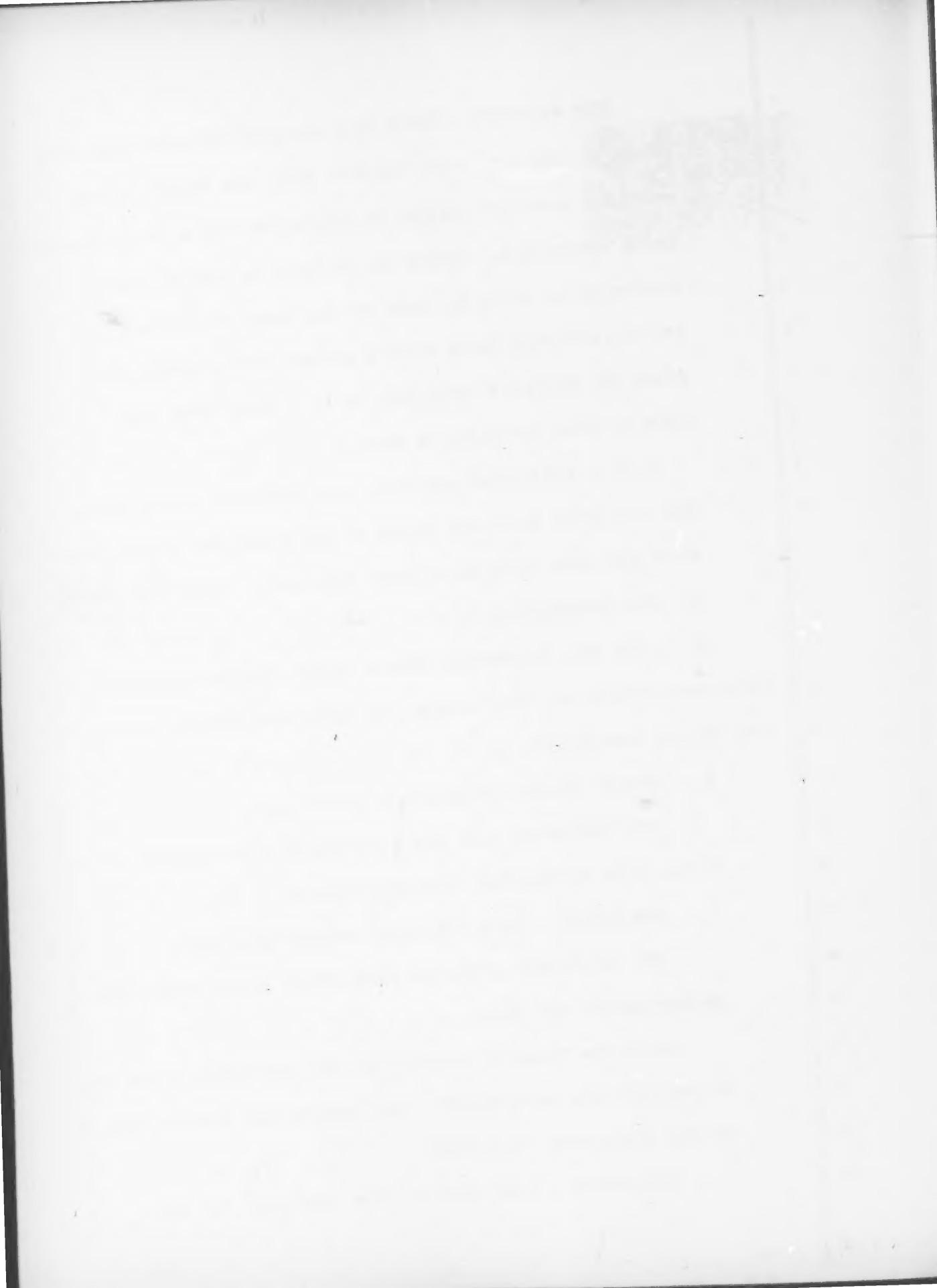
17 MR. MEISSNER: If the jury could move around, I
18 would like to publish that photograph.

19 THE COURT: Move the jury around this way.

20 MR. MEISSNER: Yes, if they could stand where the
21 photographer was then.

22 With the Court's permission, if you would allow me
23 to publish the photograph. Let one of the jurors take
24 it and then pass it around.

25 THE COURT: Hand that to the juror on the end,



1 please.

2 Q Mr. Meissner) Officer Pondakos, you have
3 another photograph that's marked Five-D. Would you explain
4 the position of the photographer when that photograph was
5 taken, please.

6 A The position of the photographer in this picture,
7 which also is of Elisa Nelson, would be standing right about
8 where I am now, taking a picture back towards the east.
9 It shows Elisa in the original position prior to any crime
10 scene investigation, face down, left hand behind the back,
11 as she was found.

12 MR. MEISSNER: I ask permission to publish it.

13 THE COURT: You can publish it.

14 (THEREUPON, the exhibit was published to the jury.)

15 Q (By Mr. Meissner) Agent Pondakos, if you would,
16 is there any difference in the general physical characteristics
17 in this area today from the way it appeared on the day that
18 the body was discovered?

19 A Yes, the total area has been more or less mowed
20 down and cut. The area behind Mr. Hart, for example, was
21 at least chest level or higher and much more thicker from
22 this point -- correction -- from the point where the leaves
23 end out to the dirt road. The section where the leaves
24 begin, almost in a circular manner, coming all the way
25 around by the jury and back this way, was all solid leaves



1 on the ground, such as is right here. We had to actually
2 dig through the leaves to get to Flisa's body in an attempt
3 to develop any kind of evidence.

4 Q All right. Officer, the jury has heard some
5 testimony concerning a crime scene search in the immediate
6 area of the body. You were here on that day when that was
7 done; is that correct?

8 A That's correct.

9 Q And you supervised that crime scene, sir?

10 A That's correct.

11 Q Would you demonstrate to the jury the boundaries
12 within which that crime scene search was conducted by the
13 technicians here at the site, please. D

14 A The area --

15 MR. DOHERTY: At this point, we would object as
16 we have objected previously, for eliciting testimony
17 at the scene. We think any testimony that should be
18 elicited should be elicited in the courtroom where we
19 can properly cross-examine the person.

20 MR. MEISSNER: I don't think this in any way
21 inhibits their ability to cross-examine, and it
22 certainly gives the jury a more accurate picture of
23 exactly what was done out here.

24 THE COURT: All right. How much further? Are
25 you just requesting that this would be --



1
2
3
4 MR. MEISSNER: I want him to go into this and
5 where the glasses were located and where the
6 tracks were. ,

7
8 THE COURT: I'll overrule the objection. Go
9 ahead, Officer.

10
11 THE WITNESS: The area that we searched was
12 immediately adjacent to the body, the area where the
13 leaves covered the ground. This search was conducted
14 more or less on hands and knees trying to separate
15 leaves, trying to reveal some evidence, anything of
16 evidentiary value. That would have been the type of
17 search that we conducted around this tree and the
18 leafy area.

19
20 The other search in the immediate area to this
21 area here was more or less just walking through and
22 doing the best we could, considering the terrain that
23 we had to deal with. As I indicated, you could barely
24 even see your shoes from where you were walking. And
25 the deputies or detectives assigned to that search were
trying to turn up anything they could actually find.

Q (By Mr. Meissner) Officer, the jury has received
testimony from Lieutenant Steigler concerning the retrieval
of the eyeglasses. Can you show us where those eyeglasses
were when you responded to the scene out here.

A Okay. This area where I'm standing is the general



1 area where the glasses were found. We measured it to be
2 approximately sixty feet from where the glasses were found
3 to where the body was located.

4 Q Okay. Would you move now to the general area of
5 the tire tracks from which the plaster casts were made.

6 MR. MEISSNER: Can we go ahead and move the jury
7 on down this way, please.

8 THE COURT: All right.

9 Q (By Mr. Meissner) Continue, please.

10 A We observed the set of tire tracks coming from
11 this general area right where I'm standing, going out back
12 toward the east, which would have been back out on County
13 Road 39. The tire tracks were lifted or plastered by
14 Technician Rothwell. They were actually lifted in the area
15 where I'm standing now, which would give a fresh print.

16 The area right here was also sandy area. It
17 wasn't as grassed-in or leaved-in as you see now, but the
18 tracks came out this way and right back out to County Road
19 39. Those were the ones plastered by Technician Rothwell.

20 Q Was there any indication of a vehicle having been
21 stuck back here or of tire slippage?

22 A That was pointed out to me, but I couldn't determine
23 that.

24 Q Okay. You don't know what would have caused the
25 configuration?



1 A I wouldn't have known what would have caused it.
2 Q Well, I have indicated that goes back out to County
3 Road 39. Does that road extend further north?

4 A County Road 39 is an extension of Nineteenth
5 Street, which is the street we were on, which eventually
6 goes out to Highway 19 and also into Spanish Trails -- not
7 Spanish Trails -- Spanish Oaks Subdivision.

8 MR. MEISSNER: Do you have any questions?

9 MR. DOHERTY: Not at this time.

10 THE COURT: All right. Rc

11 MR. MEISSNER: Okay. We will move on, then
12 the home where the Defendant was living at the ~~time~~

13 (THEREUPON, all proceedings were concluded until
14 all parties reached the next scene.)

15 Q (By Mr. Meissner) Officer Pondakos, would you
16 point out for the jury the house the Defendant was living
17 in at the time of this offense.

18 A The Defendant was living at 1388 Winding Brook
19 Way.

20 Q And is this the same house that you searched some
21 days subsequent to the murder pursuant to court order?

22 A That's correct. On November the eighth, we
23 conducted a search warrant on the house and the truck which
24 was in the garage at this residence.

25 Q Are you familiar with the location of Cheryl



1 Osborne's house?

2 Yes, sir. Her house is directly across the street.

3 MR. MEISSNER: Do you all have any questions?

4 MR. DOHERTY: Not at this time.

5 Q (By Mr. Meissner) Does this house appear to be
6 substantially the same now as it was on that date?

7 A Yes, sir.

8 MR. MEISSNER: That's it.

9 THE COURT: Does that conclude the jury view?

10 MR. MEISSNER: Yes.

11 THE COURT: If I could see counsel here for just
12 a moment before we go back.

13 (THEREUPON, an off-the-record discussion was had.)

14 (THEREUPON, all proceedings were concluded until
15 all parties reached the courthouse.)

16 THE BAILIFF: The jury is in the jury room, Your
17 Honor.

18 THE COURT: Anything before we bring the jury in?

19 Bring the jury in, Mr. Devins.

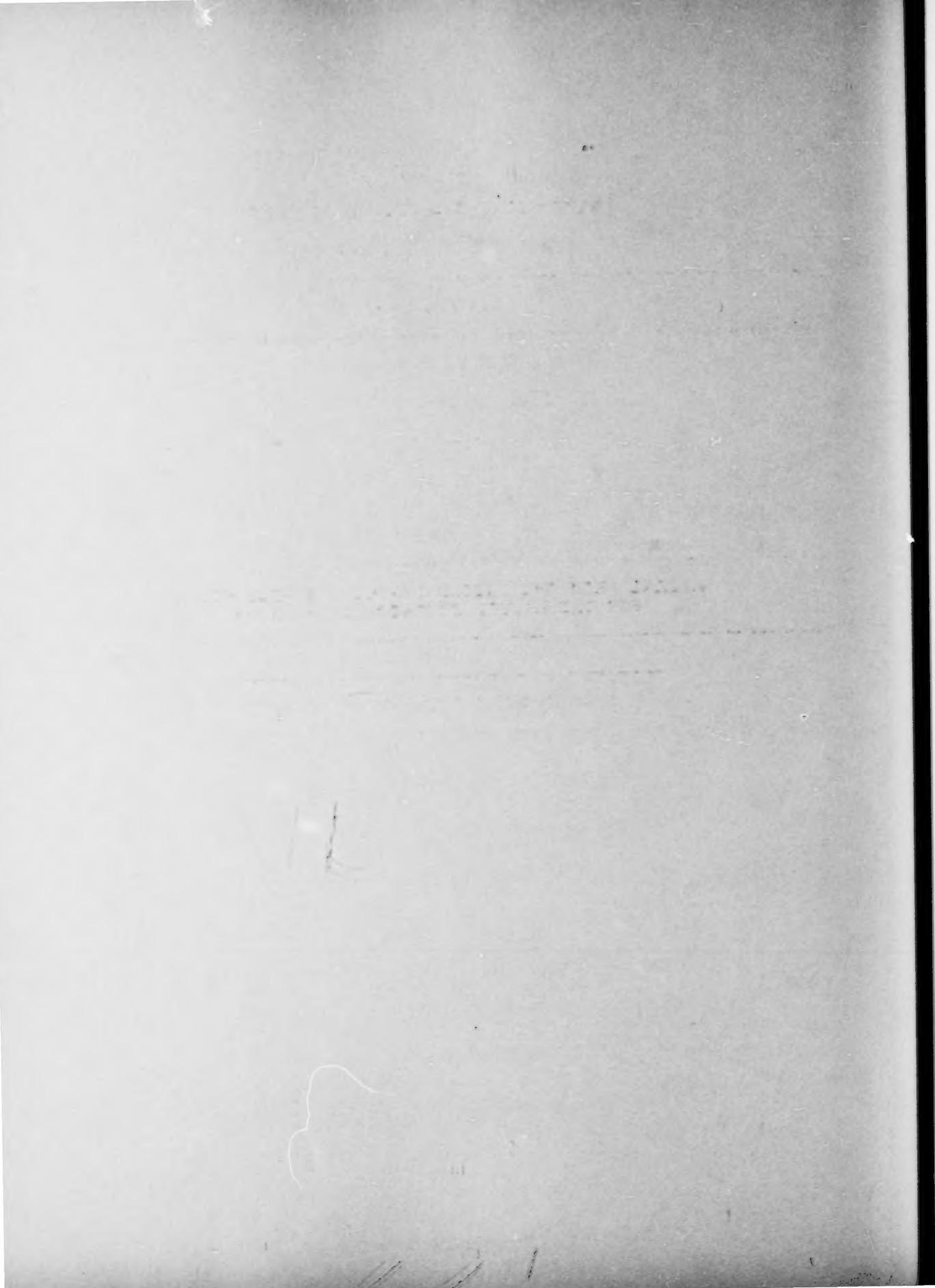
20 THE BAILIFF: The jurors are in the jury box, Your
21 Honor.

22 THE COURT: All right. Mr. Meissner?

23 He has been sworn, Mr. Devins. Have him take his
24 seat.

25 Q (By Mr. Meissner) Agent Pondakos, when did you





IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Docket No. 86-3183

LARRY EUGENE MANN,
Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

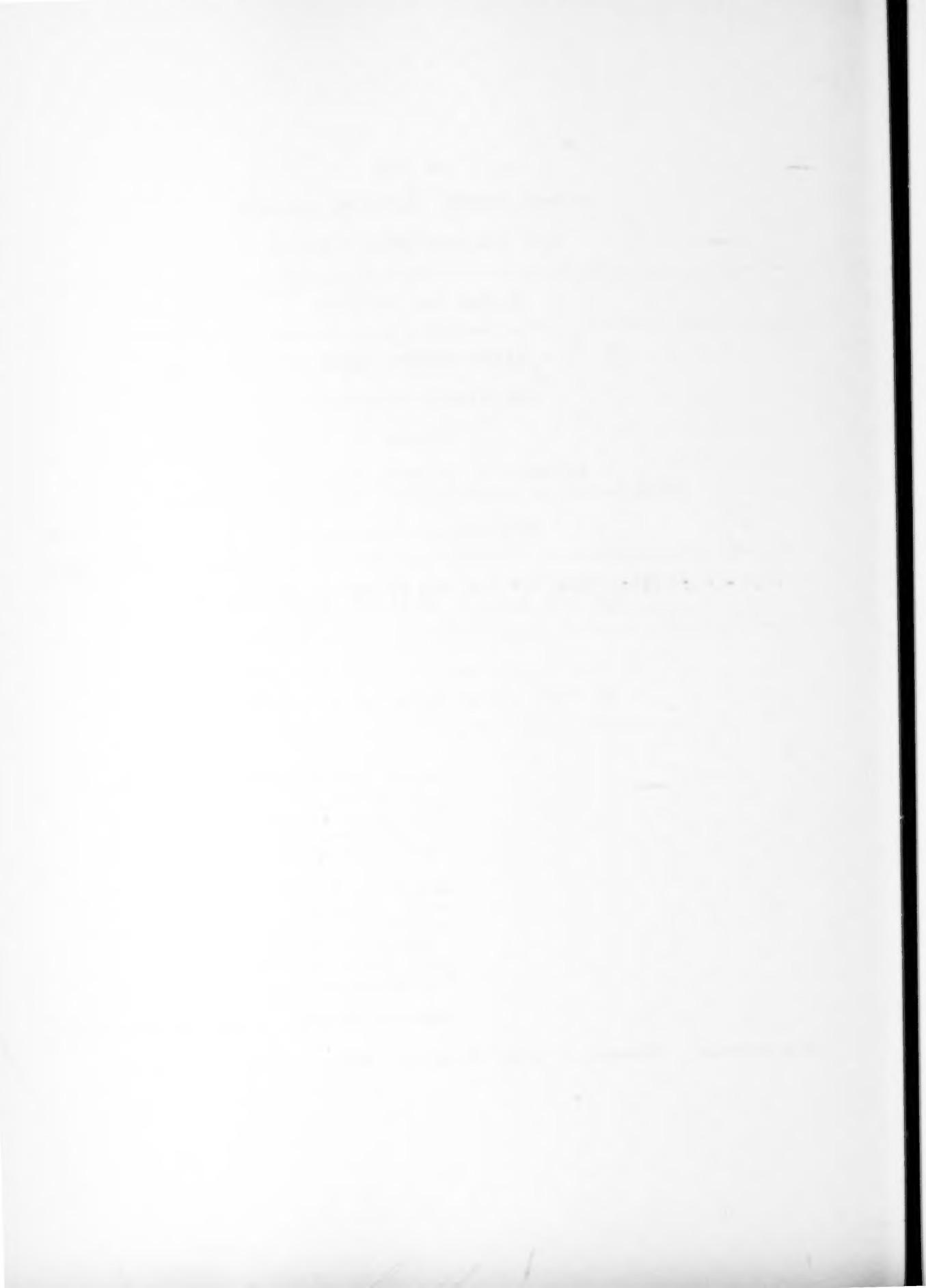
EN BANC REPLY BRIEF OF APPELLANT

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Preference: Habeas Corpus, Rule 11, App. 1(a)(3), En Banc



PRELIMINARY STATEMENT

References to the district court follow the procedure authorized by this Court, i.e., "R (Vol. #) - (Doc. #) - (Page #). References to the trial transcript and the record on appeal of Mr. Mann's trial in the Circuit Court for the Sixth Judicial Circuit, in and for Pinellas County, Florida, are cited "ROA - (Page #)." All other citations are self-explanatory or are otherwise explained.

Mr. Mann amends his Certificate of Interested Persons to include Billy H. Nolas, Mr. Mann's counsel before the panel and now co-counsel to Dean D'Alemberte, as an interested party.



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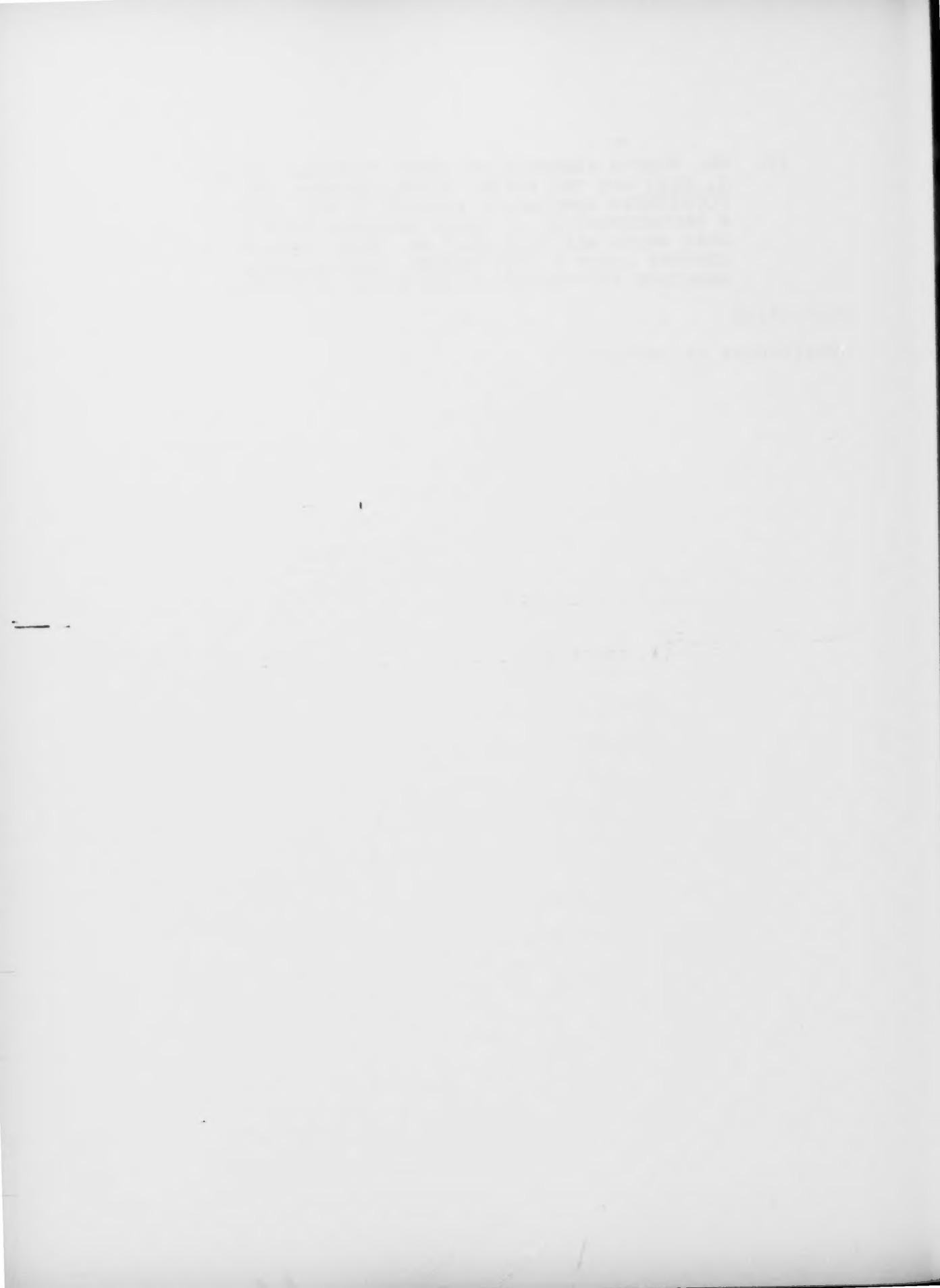
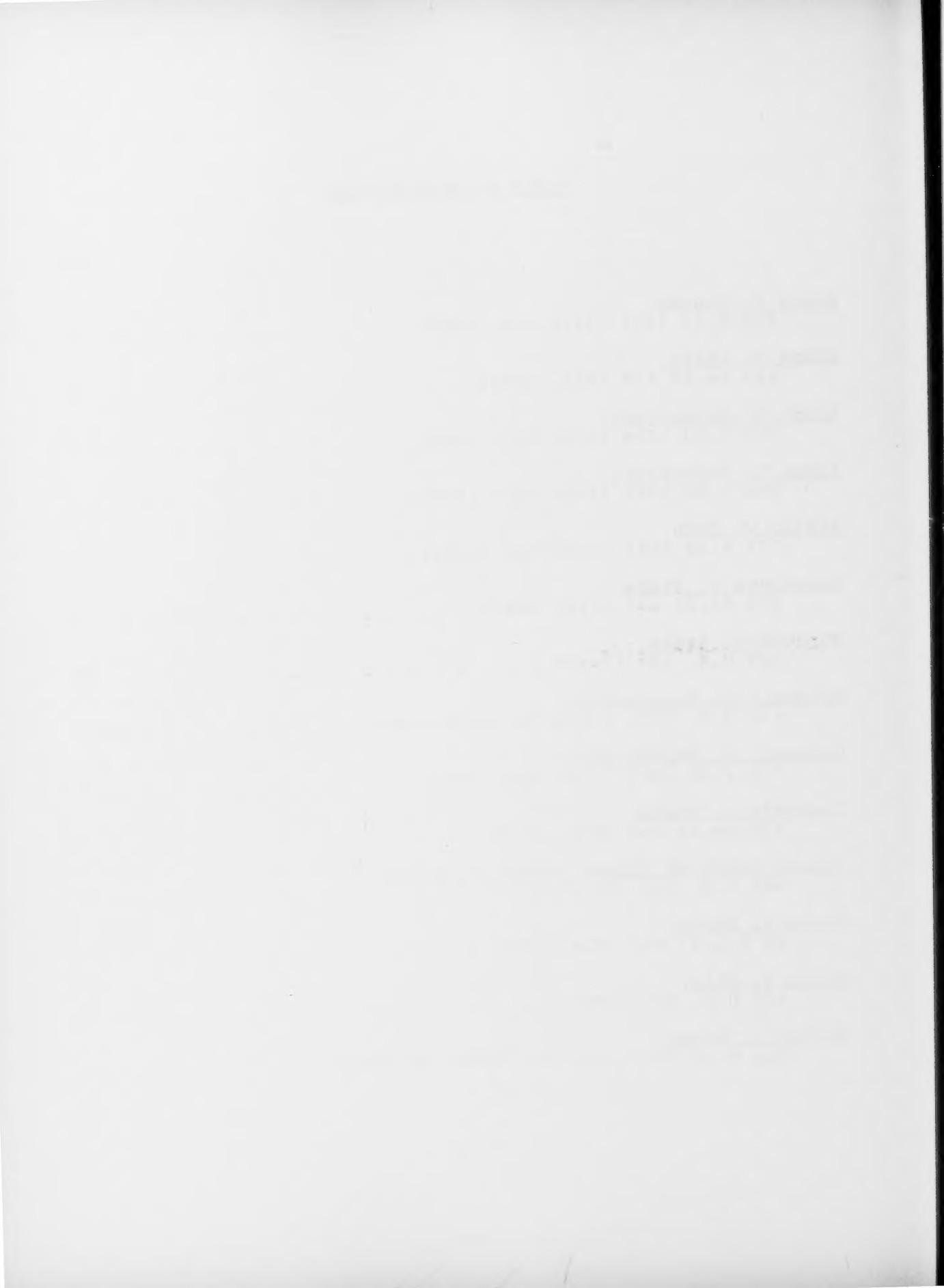
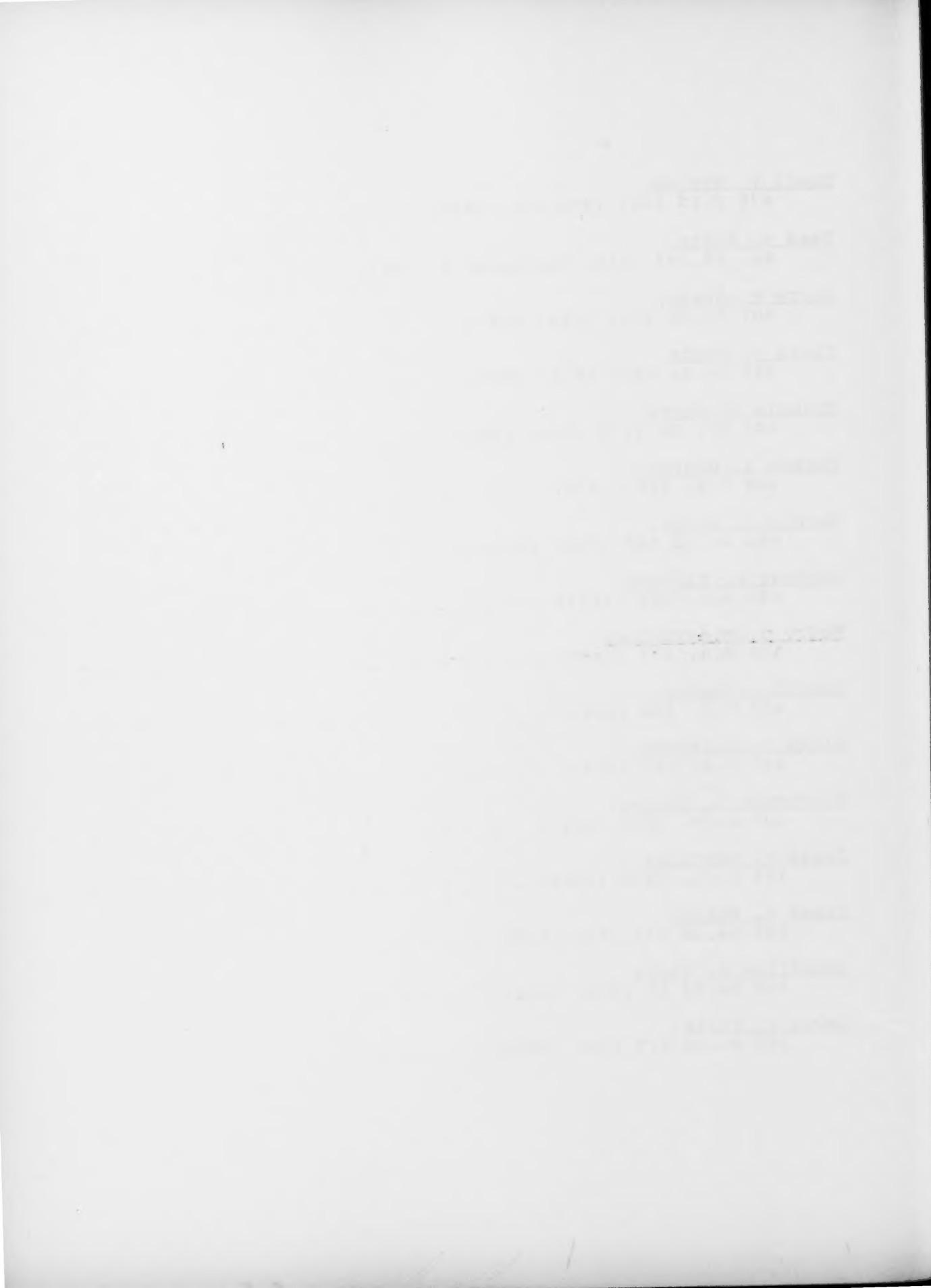


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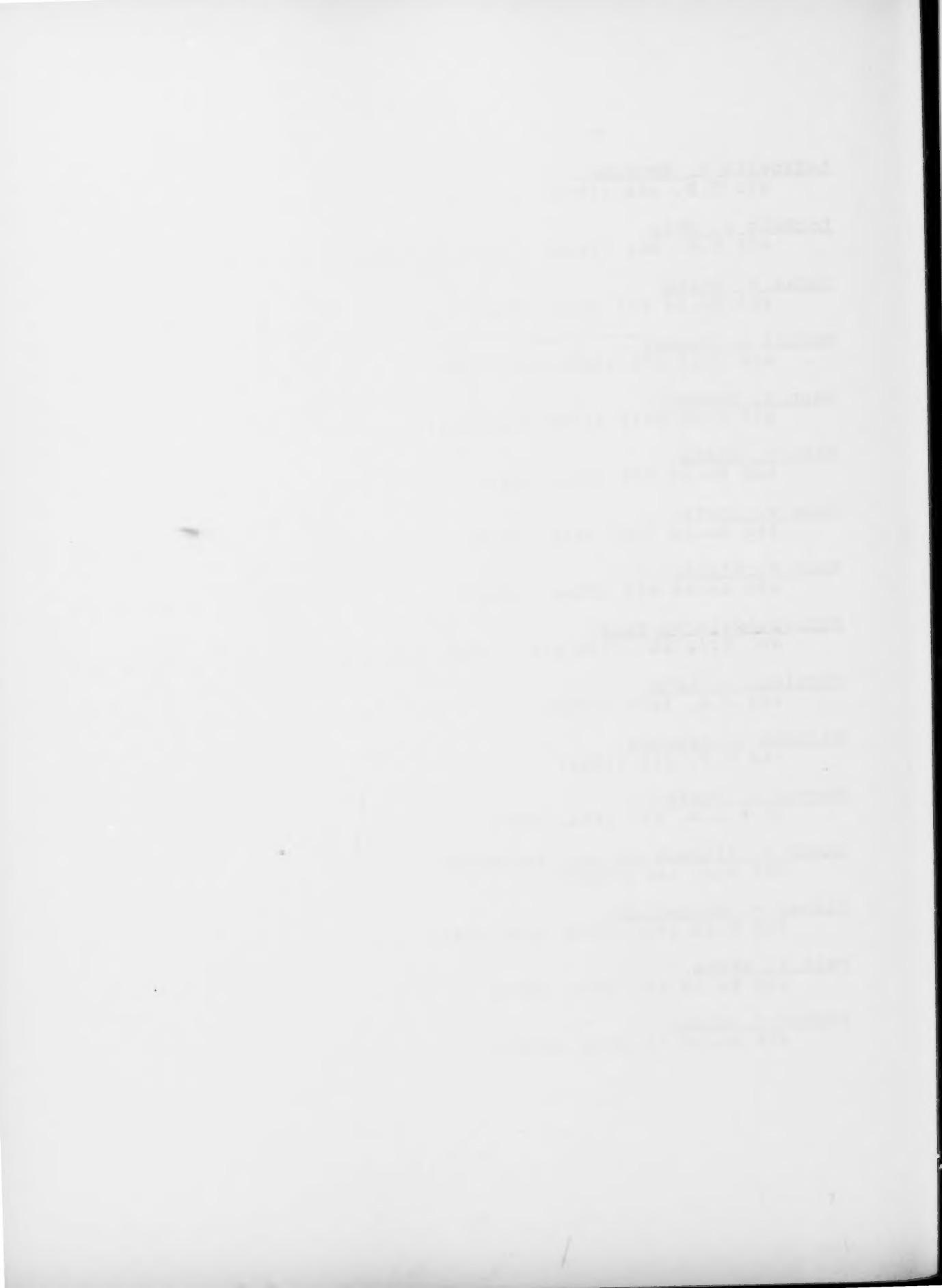
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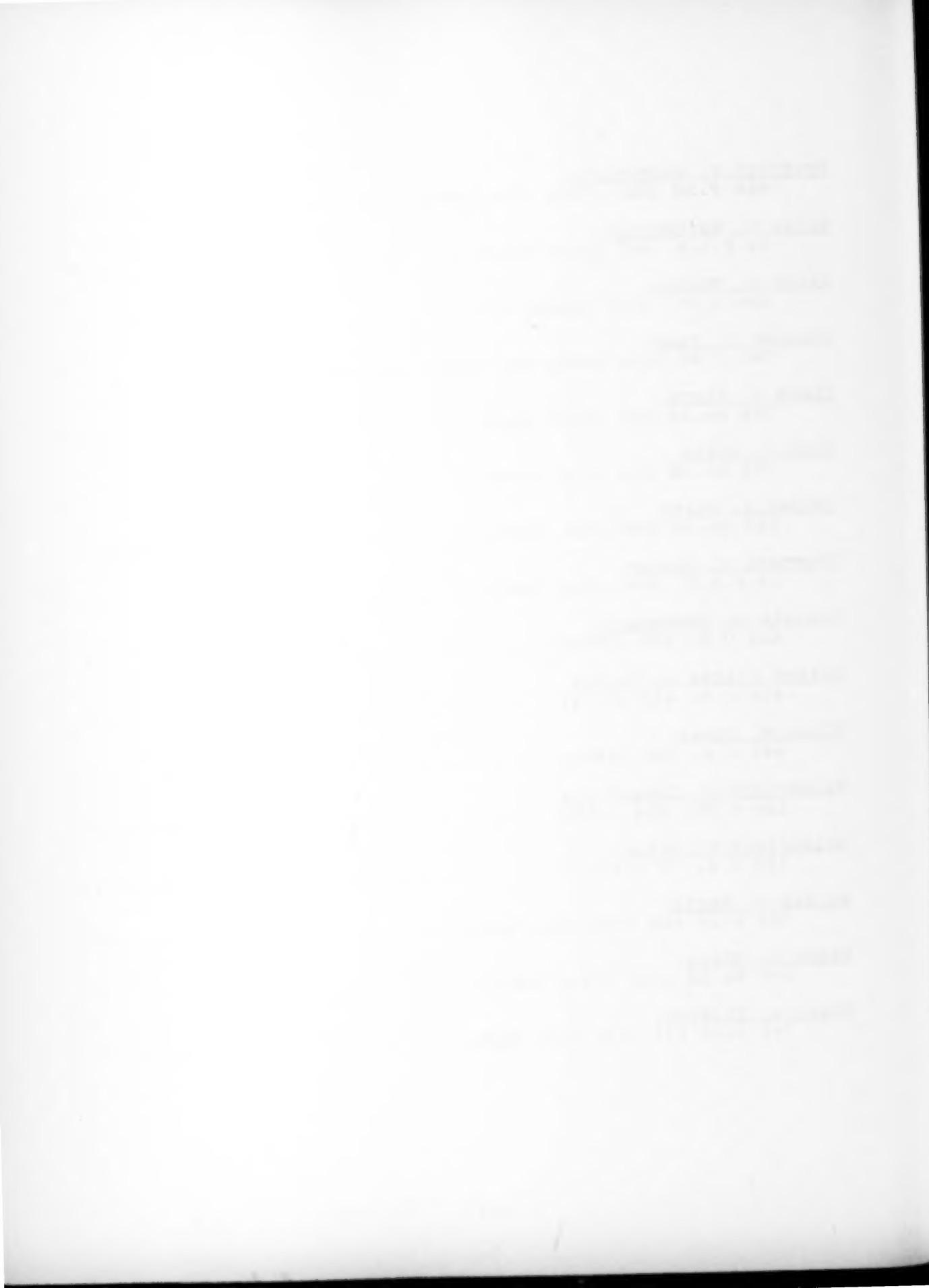
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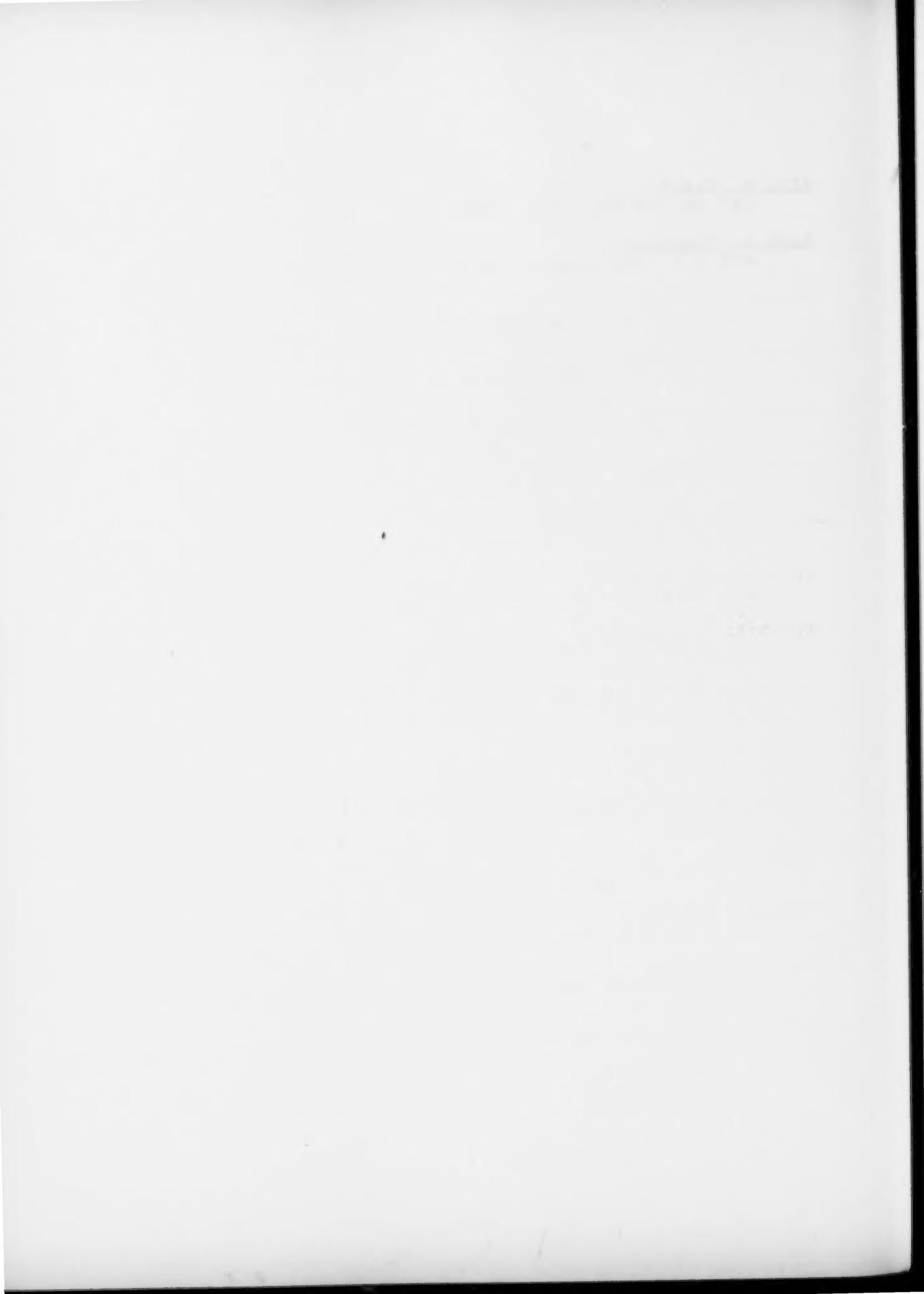
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STATEMENT OF ISSUES PRESENTED

I. Whether systematic comments by the trial judge and prosecutor throughout the course of the proceedings resulting in Mr. Mann's sentence of death diminished the jurors' sense of responsibility for the capital sentencing task that they were to perform, in violation of Caldwell v. Mississippi and the eighth and fourteenth amendments?

II. Whether Mr. Mann's involuntary absence from a jury view conducted during the course of his capital trial at which important testimony was taken from the lead investigative detective violated the Confrontation Clause and the sixth, eighth, and fourteenth amendments?

III. Whether the death sentence imposed on Mr. Mann in substantial reliance on an unconstitutional prior conviction violates the eighth and fourteenth amendments?

IV. Whether Mr. Mann's sentence of death violates Doyle v. Ohio and the fifth, sixth, eighth, and fourteenth amendments because it was based on a recommendation of death obtained from a jury which was told that Mr. Mann "showed" no remorse after a post-arrest, post-Miranda warnings invocation of his right to silence?

V. Whether the failure of the court during the sentencing phase of the trial to give a requested jury instruction that the jury could properly consider absence of flight as a mitigating factor constitutes a violation of the eighth and fourteenth amendments?

VI. Whether the failure of the jury form to indicate whether the conviction was based upon a finding of actual intent on a premeditation theory, or merely imputed intent on a felony murder theory, coupled with the failure of both the trial court and the appellate court to make a finding of actual intent, renders the sentence of death invalid under the eighth amendment?



ARGUMENT

I

SYSTEMATIC COMMENTS BY THE TRIAL JUDGE AND PROSECUTOR THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN MR. MANN'S SENTENCE OF DEATH DIMINISHED THE JURORS' SENSE OF RESPONSIBILITY FOR THE CAPITAL SENTENCING TASK THAT THEY WERE TO PERFORM IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS

A. The True Role Of A Florida Capital Sentencing Jury

The Attorney General's brief informs us that in Florida

[t]he jury plays no role in the determination of whether a defendant is death qualified.

(En Banc Brief of Respondent/Appellee ["State's Brief"], p. 33.)

We are also told that

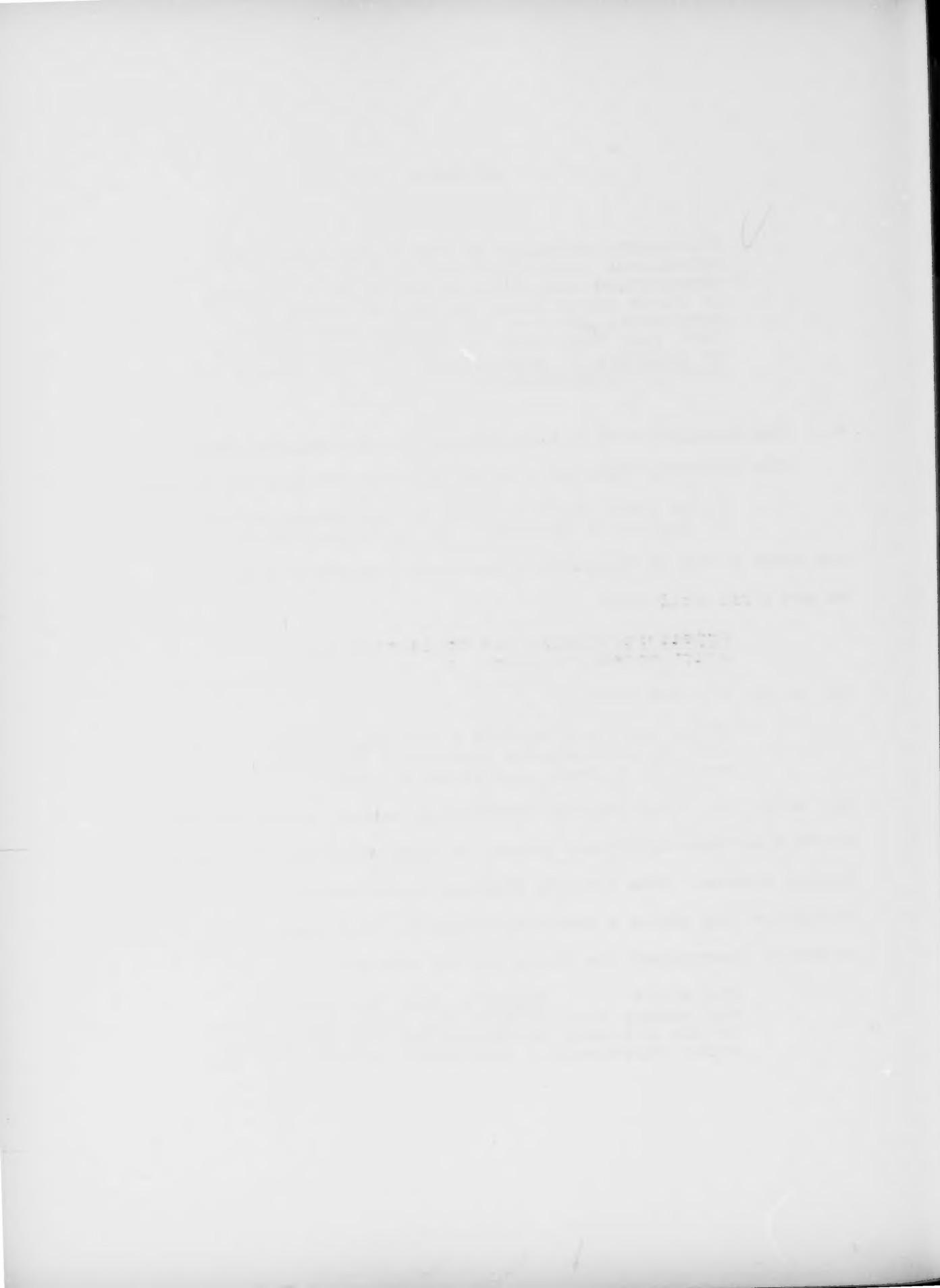
Tedder [v. State] has nothing to do with the jury's role

Id. at p. 37, and that

[t]he jury's role, vis a vis Tedder, is nothing more than a gratuitous granting of mercy to a death qualified defendant.

Id. at p. 38. The capital sentencing scheme which the State's brief discusses at great length is assuredly not Florida's post-Furman scheme. The Florida Supreme Court would certainly not recognize the State's characterization; that Court has, in fact, recently instructed the State on the subject:

The state . . . suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the

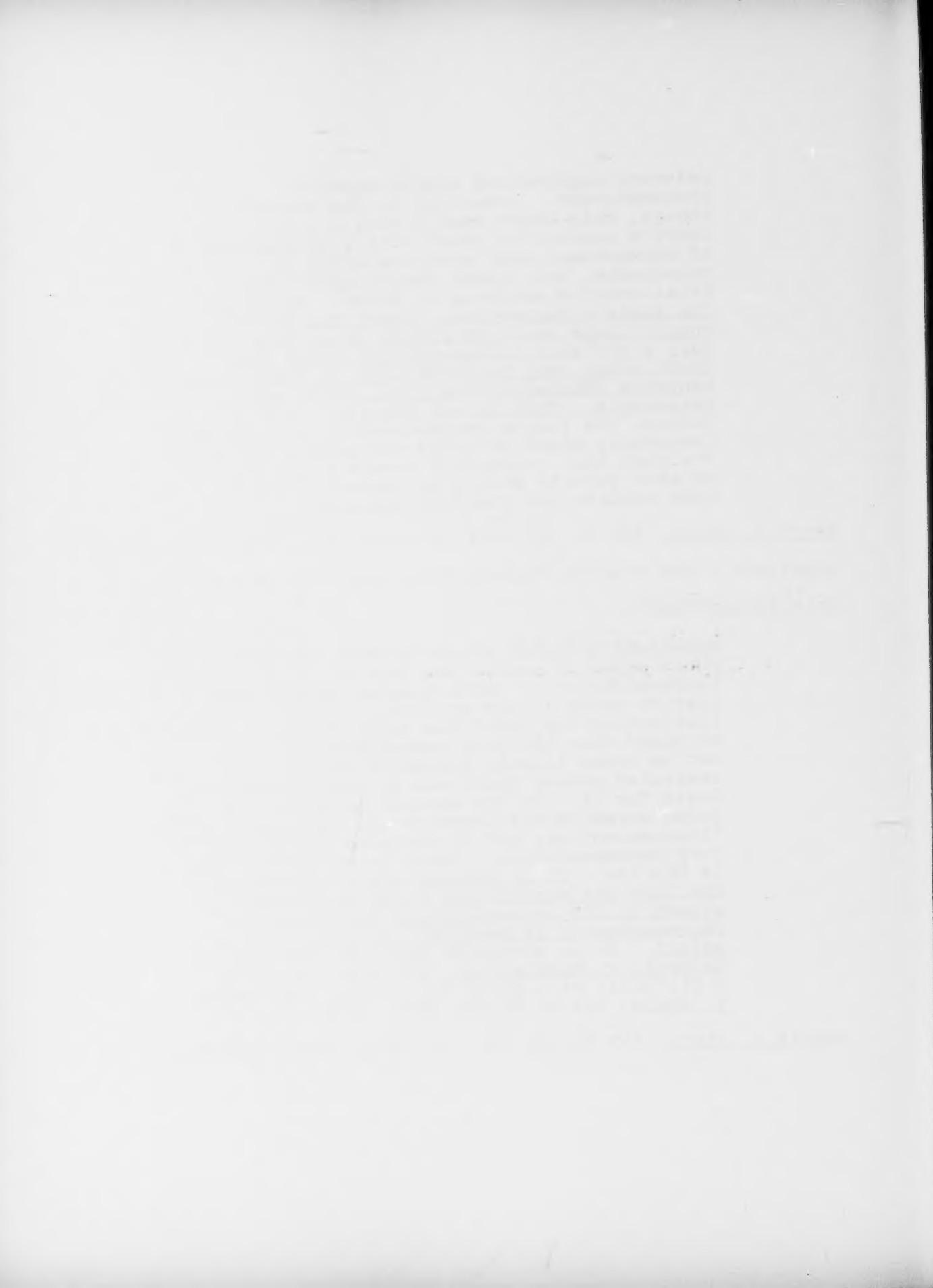


"relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987) (emphasis supplied). The Florida Supreme Court has told us that the jury's role is critical:

Appellant's eighth point is that the trial court erred in giving the jury's recommendation of death greater weight than that to which it was entitled. In instructing the jury, the trial court stressed that the jury recommendation could not be taken lightly and would not be overruled unless there was no reasonable basis for it. In its sentencing order the judge noted he was imposing the sentence "independent of, but in agreement with" the jury recommendation. There is no error; this is the law. It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and Tedder v. State, 322 So.2d 908 (Fla. 1975).

Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986) (emphasis



" supplied). The jury's crucial role is a matter which has been established for well over a decade:

[I]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

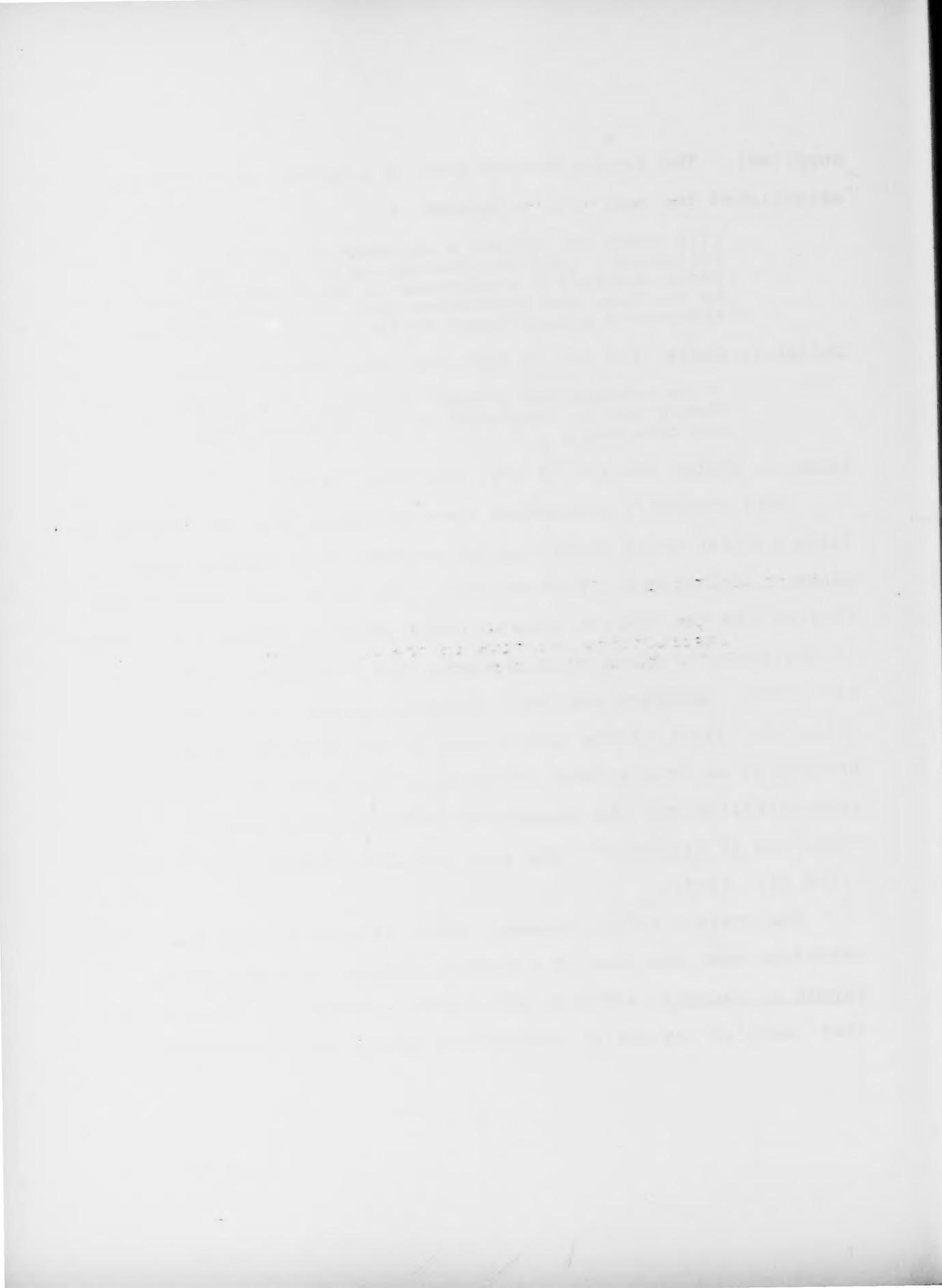
Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

[T]he recommended [death] sentence of a jury should not be disturbed if all relevant data was considered.

LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978).

This Circuit's precedents also recognize that the system the State's brief talks about has not existed since Furman. See Adams v. Wainwright, 764 F.2d 1356, 1365 (11th Cir. 1985) (Under Florida law the "jury's role in [the] advisory sentencing process is critical."); Adams v. Wainwright, 804 F.2d 1526, 1530 (11th Cir. 1986), modified sub nom., Adams v. Dugger, 816 F.2d 1433 (11th Cir. 1987) ("[t]he jury's role in the Florida sentencing process is so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell"); see also Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987).

The State's brief, however, takes us back in time and describes what the role of a Florida capital jury was before Furman v. Georgia, 408 U.S. 238 (1972). Under that statute (Fla. Stat. section 775.082(1) (1971)) the jury's role was indeed

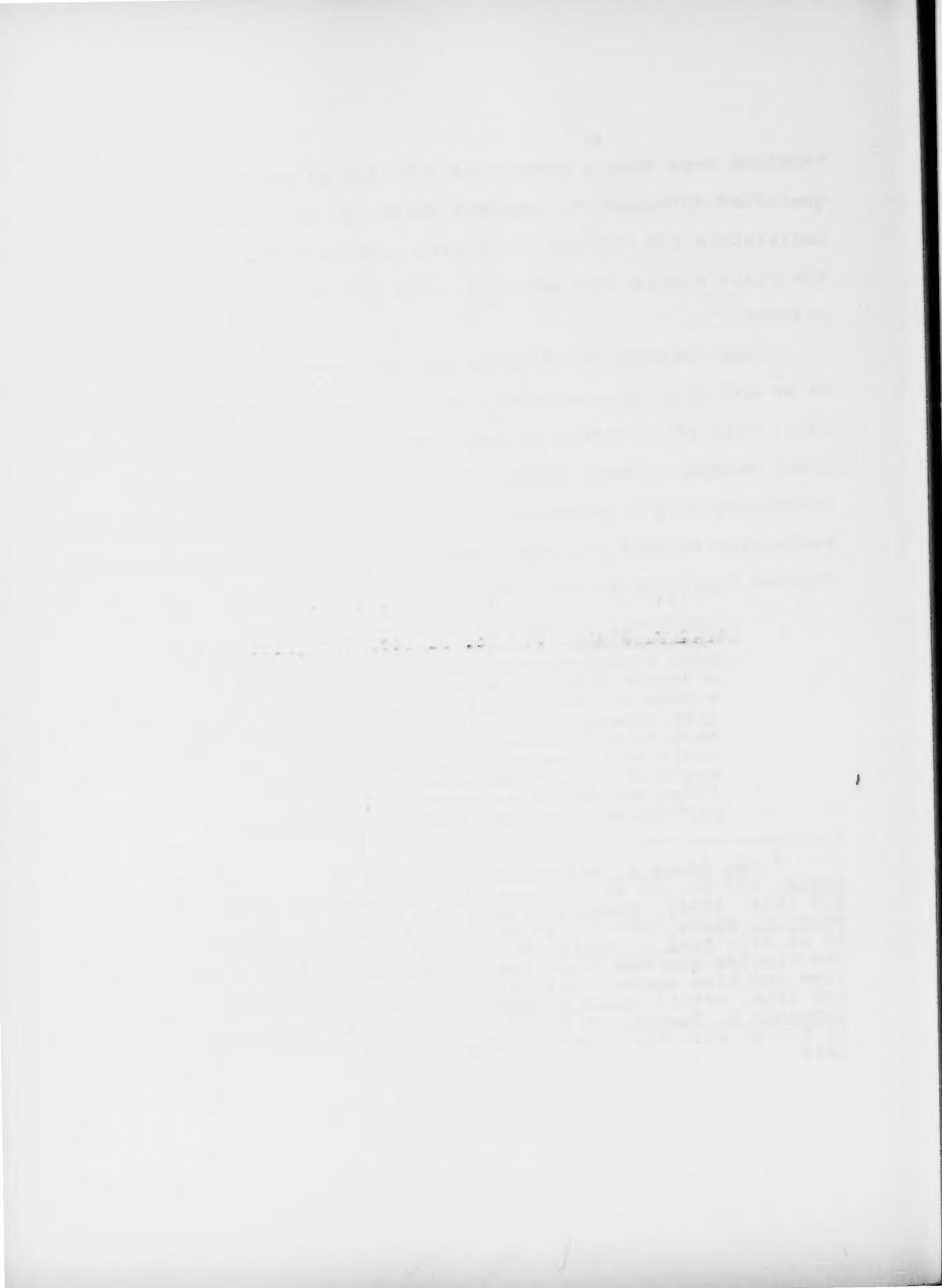


"nothing more than a gratuitous granting of mercy to a death qualified defendant." (State's Brief, p. 38). Florida's Legislature and Supreme Court have long rejected the view which the State's brief now advances. The jury's role is central and critical.¹

Thus, because "a [Florida capital] defendant has the right to an advisory opinion from a jury," Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986), because the jury's recommendation carries great weight, Tedder, supra, and because "a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process," Riley, supra, 12 F.L.W. at 458, the Florida Supreme Court has told us that

improper, incomplete or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence does violence to the sentencing scheme and the jury's fundamental role in that scheme. . . . If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would

¹ See Adams v. Wainwright, 764 F.2d at 1365; Tedder v. State, 322 So. 2d at 910; see also Brookings v. State, 495 So. 2d 135 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry v. State, 507 So. 2d at 1476-77; Garcia v. State, 492 So. 2d at 367; Lead v. State, No. 68,341 (Fla. September 3, 1987). The Florida Supreme Court has emphasized the jury's critical role time and time again. See, e.g., Riley v. Wainwright, 12 F.L.W. 457 (Fla. 1987); Downs v. Dugger, 12 F.L.W. 473 (Fla. 1987); Thompson v. Dugger, 12 F.L.W. 469 (Fla. 1987); Morgan v. State, 12 F.L.W. 433 (Fla. 1987); Lucas v. State, 490 So. 2d 943 (Fla. 1986).



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be distorted. . . . If the jury's recommendation, upon which the judge must rely, resulted from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

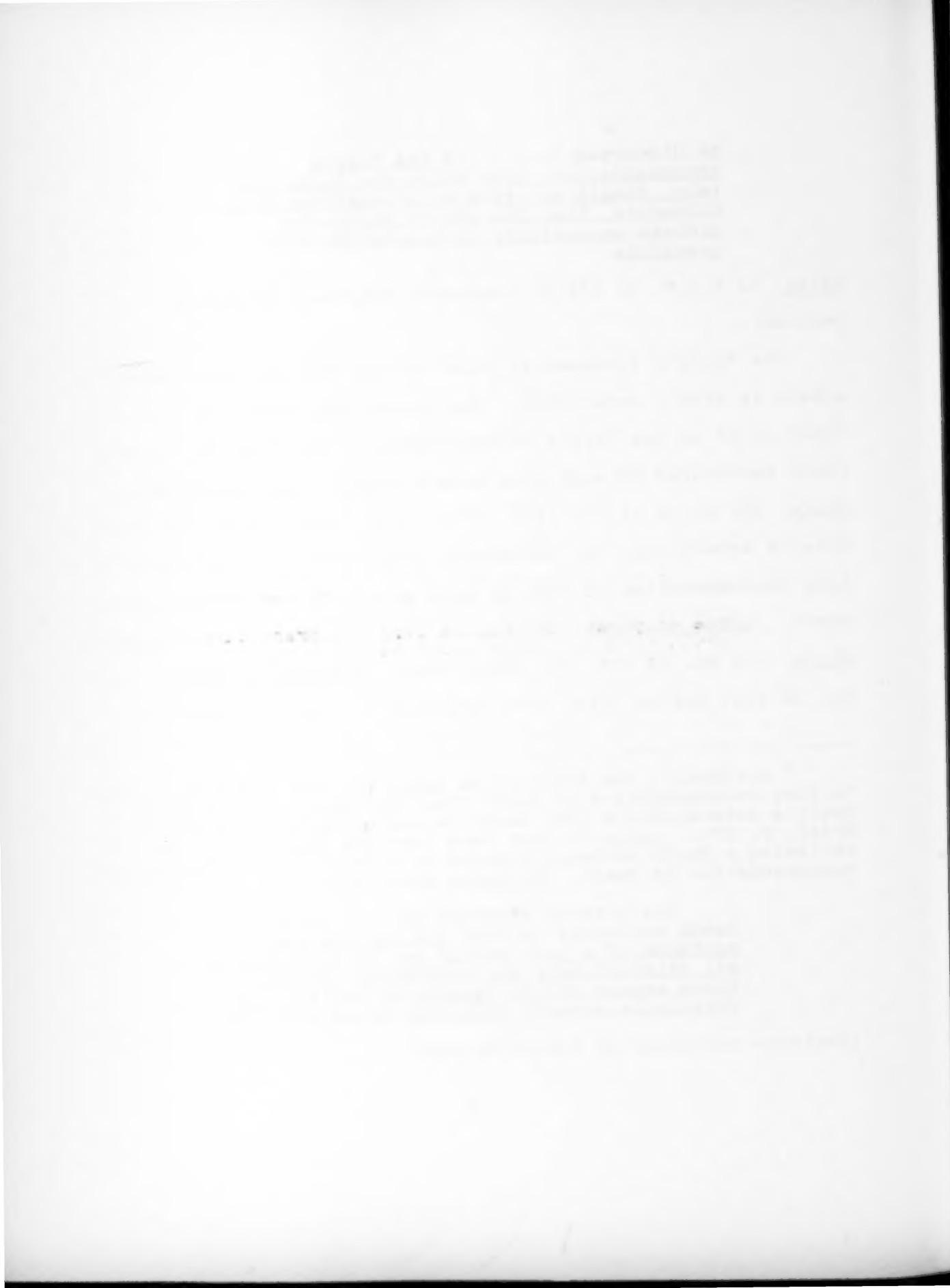
Riley, 12 F.L.W. at 458-59 (emphasis supplied) (citations omitted).

The "jury's fundamental role" in the Florida death penalty scheme is simply undeniable. The sentencing judge, in fact, "must rely" on the jury's recommendation. The Florida Supreme Court recognized as much even before Tedder, see Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974), and, contrary to the State's brief's assertions, the sentencing judge must give deference to a jury recommendation of life as well as a jury recommendation of death. LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978); Stone v. State, 378 So. 2d 765, 773 (Fla. 1980); Chambers v. State, 339 So. 2d 204, 208-09 (Fla. 1976) (England, J., concurring).²

² Curiously, the State cites LeDuc for the proposition that "a jury recommendation of death [has] no impact on the trial court's determination that death is appropriate." (State's Brief, p. 27). LeDuc in fact says just the opposite -- in reviewing a death sentence imposed by a trial court after a jury recommendation of death, the LeDuc court held:

The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the

(footnote continued on following page)



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However, even if the State correctly asserted that a jury's death recommendation was essentially meaningless, Caldwell v. Mississippi would nevertheless apply to Florida, and Mr. Mann would still be entitled to relief:

[t]he important consideration is not whether a presumption of correctness attaches to a recommendation of death, but whether the judge's statements made it less likely that a life sentence would be recommended.

Adams, 804 F.2d at 1530 n.3. Consequently,

[e]very error . . . which makes it less likely that the jury will recommend a life sentence . . . deprives the defendant of the

(footnote continued from preceding page)

recommendation. On the record placed before the jury in this case, a recommended sentence of death was certainly reasonable. Indeed, the only data on which a life recommendation could have been made would have had to be grounded on the nonevidentiary recommendation of the prosecutor and the emotional plea of defense counsel.

365 So. 2d at 151, citing Tedder v. State (emphasis added).

Similarly, in Stone v. State, supra, the Court discussed a challenge to a death sentence imposed after a jury death recommendation. The appellant grounded his challenge on a similar case, Swan v. State, 332 So. 2d 485 (Fla. 1975), in which the Florida Supreme Court had reversed the death sentence. In affirming Stone's sentence, the Court pointed out the critical difference between Stone's case and Swan's:

Swan's jury recommended mercy while Stone's recommended death and the jury recommendation is entitled to great weight. Tedder v. State, 322 So.2d 557 (Fla. 1975).

Stone, 378 So. 2d at 773. Death or life, a Florida sentencing jury's vote must be given deference.



8

protections afforded by the presumption of correctness that attaches to a jury's verdict recommending life.

Adams v. Wainwright, 764 F.2d at 1364. The State's efforts to make a Florida jury's sentencing role appear meaningless are simply untenable.

B. Caldwell v. Mississippi Applies In Florida

Because a Florida sentencing jury's recommendation is entitled to "great weight," the "risk that a capital sentence could be imposed without anyone making the calculations and deliberations required for the imposition of a capital sentence," (State's Brief at 32), which the State refers to as the "bottom line" of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985) (State's Brief at 32), assuredly demonstrates that Mr. Mann is entitled to relief. Mr. Mann's jury was repeatedly informed that they had no responsibility for sentencing, that the decision "was not on their shoulders," that it rested "solely" with the judge, that the judge would have "the opportunity to learn more before he impose[d] a sentence" (ROA 2439), and that they "should give to him the prerogative of imposing the death penalty, if that's what he ultimately feels is required . . ." Id.⁴ Yet the

⁴ Mr. Mann's jurors were in fact more egregiously misled than those in Caldwell. Here the prosecutor, sanctioned by the judge's instructions, [mis]informed them that only by voting for death would they assure that the judge would make a fair sentencing determination after considering all the factors -- (footnote continued on following page)

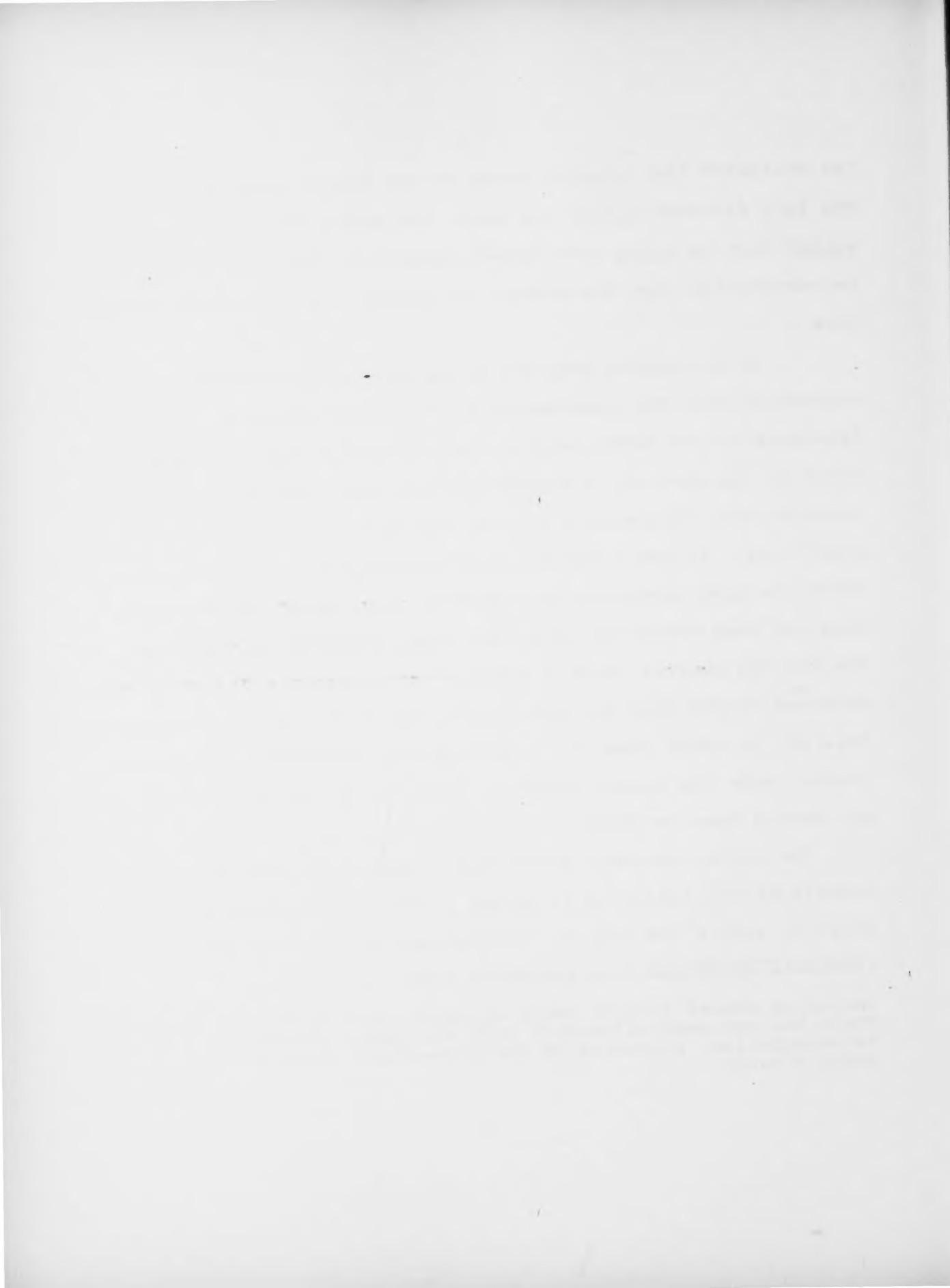
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law obligated the judge to defer to the jury's verdict, and after the jury finished all of its work, the sentencing judge himself stated that he would give "great weight" to the jury's recommendation (See ROA 2464). Of course, the jury never heard this.

In Mr. Mann's case the prosecutor's "uncorrected suggestion that the responsibility for [the] ultimate determination of death [would] rest with [the judge]," Caldwell, 105 S.Ct. at 2641-42, a suggestion then confirmed by the judge's instructions, intolerably allowed the jury to "minimize its role." Id. If the judge followed Florida law, as he said he would, he gave deference to a verdict returned by jurors whose role had been minimized (ROA 2464). See Tedder v. State, supra. The Florida Supreme Court's limited "proportionality" review then deferred to the jury and the judge. The risk that the "players fail[ed] to catch [the] ball because each believe[d] the other [would] make the catch" (State's Brief, p. 32) is precisely what Mr. Mann's case is about.

The State, however, profoundly misperceives the issue. The constitutional infirmity in Caldwell was not the failure of the court to inform the jury of the presumption of correctness to
(footnote continued from preceding page)

including secret factors which he would learn about but which the State had not been allowed to tell the jury. However, a life recommendation, according to the prosecutor, would tie the judge's hands.



which their sentencing decision was entitled in the appellate court; rather, the Eighth Amendment violation stemmed from the fact that the prosecutor informed the jury that their decision would be reviewed by a more qualified authority (a higher court), thereby signalling them that any error would be corrected and that the ultimate sentencing responsibility rested elsewhere.

Caldwell, 105 S.Ct. at 2638, 2641-42. This is also the constitutional infirmity in Mr. Mann's case -- in fact, here the unreliability of the jury's verdict is even greater, for the jurors were told that the better qualified authority (the judge) would learn things about the defendant that they were not allowed to know. (See, e.g., ROA 2439). The State nevertheless mischaracterizes Mr. Mann's claim as a challenge to the trial court's failure to instruct the jury regarding the "great weight" to be given their decision under Tedder. (See, e.g., State's Brief, pp. 37, 38, 41, 46, 46A). This is inaccurate.

As in Caldwell, the Eighth Amendment was offended in Mr. Mann's case not by the Court's failure to instruct the jury regarding "great weight." Rather, the Eighth Amendment here was abrogated by the prosecutor's and the trial court's diminishing of the jury's true responsibility at sentencing (e.g., "not on your shoulders" [ROA 1218-19]; "[the] decision rests up here with the law, with Judge Federico" [ROA 1218]; "[h]e may have the opportunity to learn more before he imposes a sentence" [ROA

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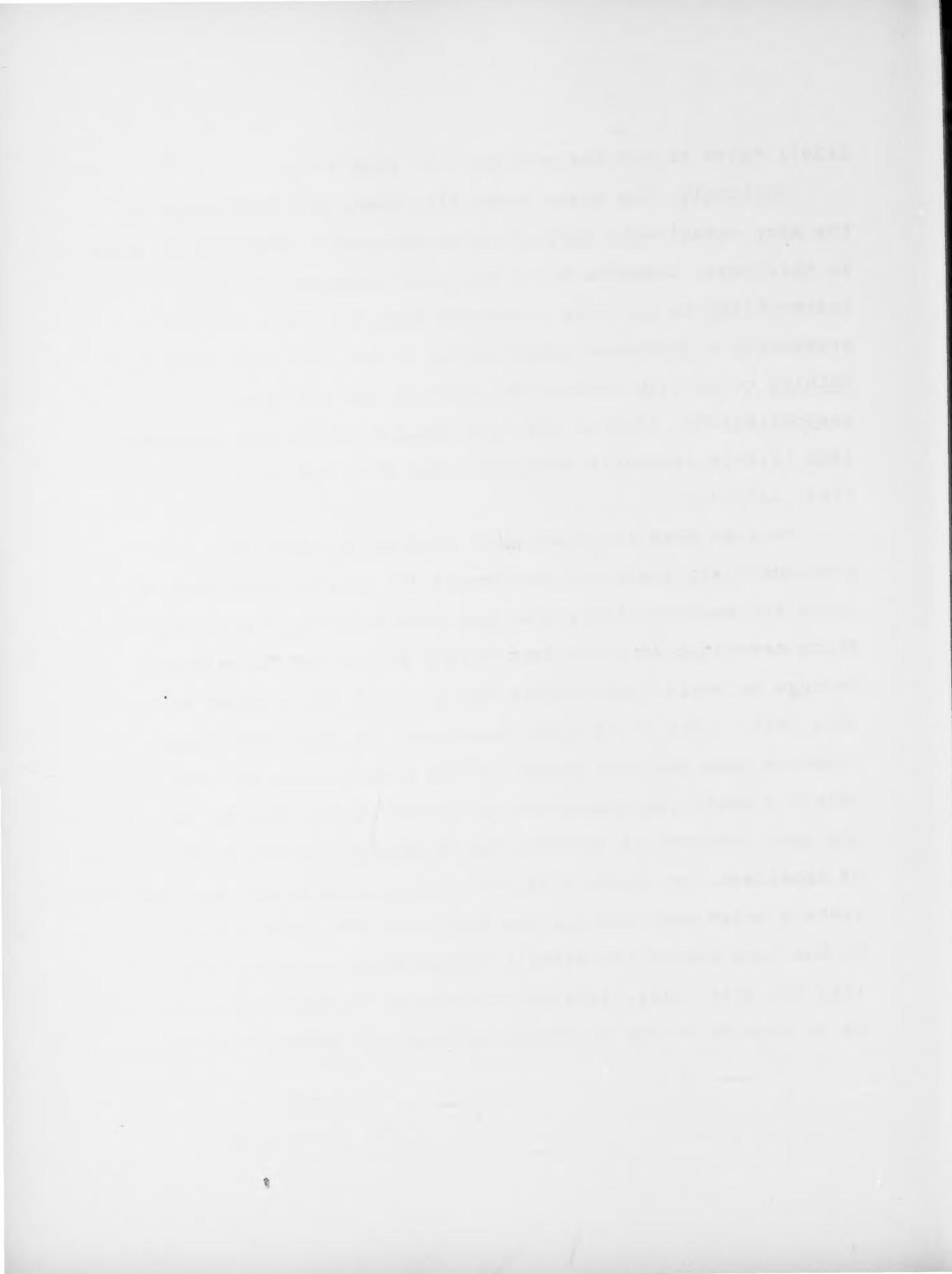
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2439]; "give to him the prerogative" [ROA 2439].)

Curiously, the State never discusses, nor even mentions, the many egregiously misleading prosecutorial comments at issue in this case, comments which the court adopted in its instructions to the jury. Nowhere does the State discuss the prosecutor's continued exhortations to the jury that they had nothing to do with sentencing, that it was not their responsibility, that it was "not legally on [their] shoulders" (ROA 1218-19 [emphasis supplied]; see also ROA 1216, 1217, 1218, 1363, 2272-73).

Neither does the State ever mention the fact that the prosecutor affirmatively encouraged the jury to turn over to the judge any responsibility they may have felt for sentencing; the State never mentions the exhortation to let the judge decide because he would learn things the jury was not allowed to know (ROA 2439). The State never discusses the fact that those comments were part and parcel of the prosecutor's efforts to obtain a death recommendation by exhorting the jury to rely on the most improper of factors. See generally Initial En Banc Brief of Appellant, pp. 21-22 n.16 and accompanying text. Nor does the State's brief ever address the fact that the court's instructions to the jury echoed the State's responsibility-diminishing theme (see ROA 2344, 2361, 2453-54). Finally, the State's brief gives us no clue as to why we should consider Mr. Mann's sentence



reliable. This is not surprising: given the prosecutor's comments and the judge's sanctioning instructions in this case, the State simply cannot show that the statements had "no effect" on the jury's sentencing verdict. Caldwell, 105 S.Ct. at 2646; Adams v. Wainwright, 804 F.2d at 1531.

Not once does the State try to explain why the comments did not affect the jury. The comments did have an effect. Caldwell; Adams; Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987) (en banc). The facts cannot be ignored. Mr. Mann is entitled to the relief he seeks.⁵

C. Mr. Mann's Claim Is Not Procedurally Barred

The State tells us that Mr. Mann's Caldwell v. Mississippi claim is not "novel" because the Florida Supreme Court has not considered it a "novel" claim (State's Brief at 7, passim). But the State ignores the fact that the adequacy and independence of any asserted state procedural bar, as well as the question of cause and prejudice, are all federal issues to be determined by federal standards.⁶

⁵ Mr. Mann had the right to a reliable jury sentencing recommendation. The prosecutor and judge arbitrarily deprived him of that right. For this reason too he is entitled to relief. See Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980).

⁶ See Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986)(en banc); Amadeo v. Kemp, 773 F.2d 1141 (11th Cir. 1985); see also County Court of Ulster County v. Allen, 442 U.S. 140 (1979); Henry v. Mississippi, 379 U.S. 433 (1965); Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986).



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Caldwell announced a substantial change in Eighth Amendment jurisprudence. See Adams v. Dugger, supra, 816 F.2d at 1494-98. See also Dutton v. Brown, supra, 812 F.2d at 596. In fact, Caldwell represents a "substantial change" in Eighth Amendment law which went far beyond the change announced in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), for whereas Hitchcock only changed the "standard of review" under which recognized constitutional claims were determined,⁷ Caldwell established a class of constitutional claims which did not previously exist:

None of the [pre-Caldwell Eighth Amendment] cases indicated that prosecutorial comments or statements by a trial judge to the jury, other than those that limited the mitigating factors that could be considered, implicated the Eighth Amendment prohibition against cruel and unusual punishment.

Adams v. Dugger, 816 F.2d at 1499. Nevertheless, inconsistently, the Florida Supreme Court has held Hitchcock to be a "change in law" cognizable in state post-conviction proceedings, Thompson, supra; Downs, supra, while rejecting the view that Caldwell is such a change in law.

This will not do -- if any claim falls squarely within the rubric of the Witt v. State, 387 So. 2d 922 (Fla. 1980), analysis, Caldwell assuredly does. See Adams v. Dugger, supra. The

⁷ See Thompson v. Dugger, 12 FLW 469 (Fla. 1987) (Hitchcock rejected "mere presentation" standard of review applied to Lockett v. Ohio, 438 U.S. 586 [1978], issues); Downs v. Dugger, 12 FLW 473 (Fla. 1987) (same).



procedural bar asserted by the State is simply not independent and adequate:

Caldwell . . . is the very type of claim for which Florida created the Rule 3.850 procedure. See Witt, 387 So.2d at 927 (genesis of Rule 3.850 procedure was Florida's desire to provide a mechanism for petitioners to raise challenges based on major constitutional changes in the law "where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set aside"). Therefore, the Florida Supreme Court's holding that Adams' Caldwell claim is barred for failure to raise it on direct appeal either must rest on an incorrect determination as to the applicability of Caldwell, or represents application of a procedural bar with regard to a type of claim that Florida does not regularly and consistently bar. See Ake v. Oklahoma, 470 U.S. 68, 74-75, 105 S.Ct. 1087, 1092-93, 84 L.Ed.2d 58 (1985) (when application of state procedural bar depends on an antecedent ruling as to whether federal constitution error has been committed there is no independent and adequate state law ground); Spencer, 781 F.2d at 1470 (state procedural rule that is sporadically applied is not independent and adequate state ground).

Adams v. Dugger, 816 F.2d at 1497.

Moreover, by now there can be no doubt that Caldwell's novelty is sufficient to establish "cause":

Further, we find that Adams has established cause and prejudice for any procedural default resulting from his failure to raise this claim on direct appeal. When "a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of a petitioner's procedural default, the petitioner has cause for the failure to raise the claim in



*
accordance with the state procedural rule.
Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901,
2901, 82 L.Ed.2d 1 (1984).

Adams, 816 F.2d at 1497. Caldwell is precisely the "novel" type of claim which was the Supreme Court's concern in Reed v. Ross. See Adams v. Dugger, supra; Dutton v. Brown, supra, 812 F.2d at 596; McCorquodale v. Kemp, No. 87-8724 (11th Cir., Sept. 20, 1987).

Under federal standards, Mr. Mann has established "cause". Prejudice, of course, is established "when [a petitioner] presents a meritorious Caldwell claim." Adams v. Wainwright, 804 F.2d at 1531 n.7.⁸ Mr. Mann's claim is certainly meritorious.⁹

⁸ The interests of justice also demonstrate that Mr. Mann is entitled to relief and also show the substantial prejudice which Mr. Mann has suffered. But here, too, the State misses the point. The jury minimizing comments in this case "serve[d] to pervert the jury's deliberations concerning the ultimate question of whether in fact [Larry Eugene Mann should be sentenced to die]". Smith v. Murray, 106 S.Ct. 2661, 2668 (1986). In this context, no Sykes bar can apply. Smith v. Murray, supra.

⁹ The State, as expected, relies on Pait v. State, 112 So.2d 380 (Fla. 1959) to argue that Mr. Mann's claim is not "novel" (State's Brief, p.8). Pait, a pre-Furman state-law decision, involved the reversal of a conviction pursuant to the Florida Supreme Court's exercise of authority akin to federal circuit court supervisory power. It had nothing to do with the Eighth Amendment. Of course, "[t]he mere fact a practice may be condemned as a matter of state law does not indicate that it is also an Eighth Amendment violation." Adams, 816 F.2d at 1499 n.6.



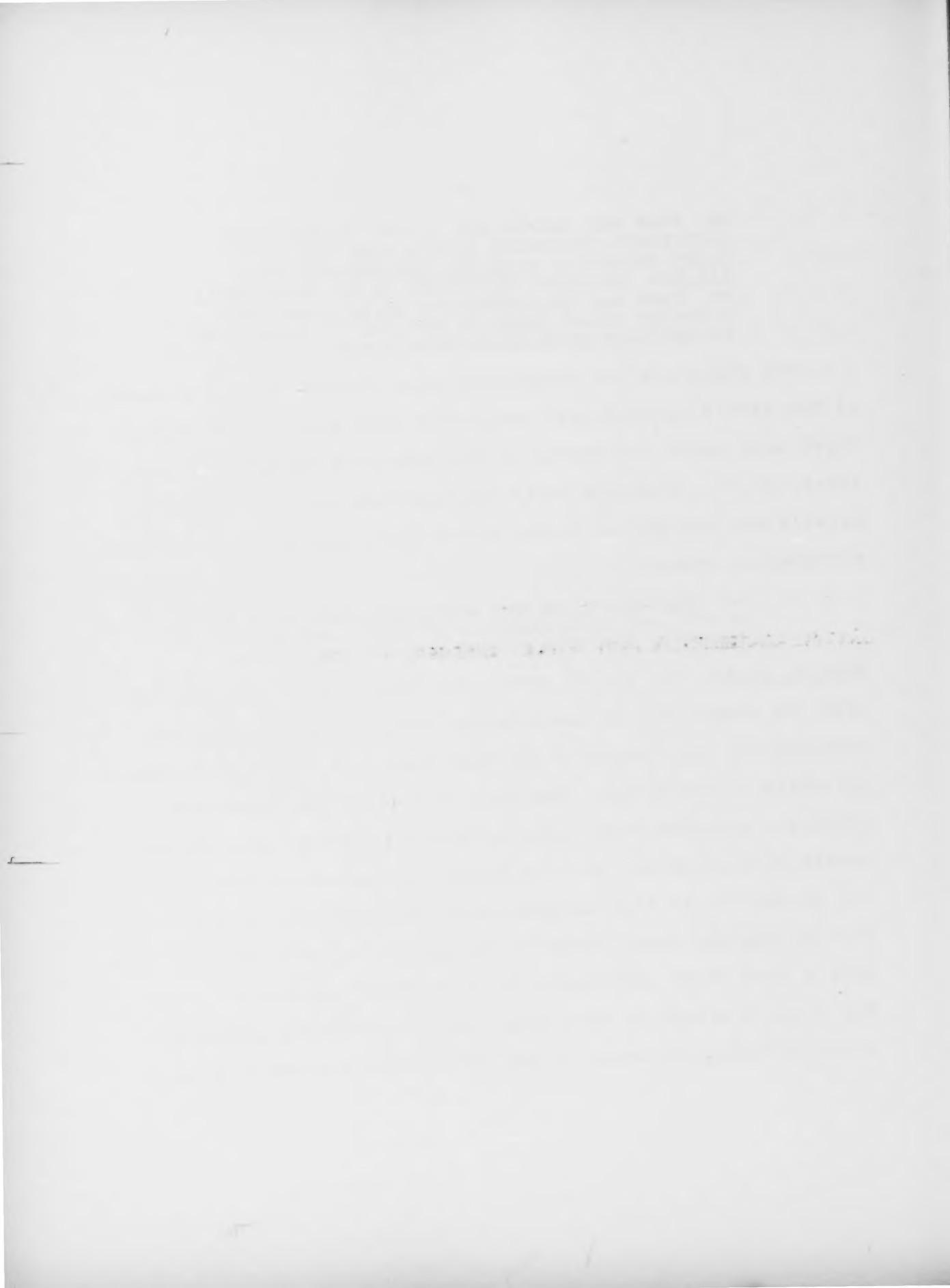
II

MR. MANN WAS DENIED HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN THE TRIAL COURT CONDUCTED CRITICAL PROCEEDINGS AND ALLOWED IMPORTANT TESTIMONY TO BE TAKEN WHILE MR. MANN WAS INVOLUNTARILY ABSENT, AND THE DISTRICT COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING ON THIS CLAIM

The State's brief cavalierly asks, "If there is a discussion of the merits, please tell respondent what the Florida Supreme Court said about the merits of the defaulted issues [?]" (State's Brief, p.15). What the State omitted from its brief's various quotes to the state-court opinions in this case provides an answer:

In conclusion, we are satisfied that this was a well and conscientiously tried case by counsel, the trial judge and the jury.

Mann v. State, 482 So. 2d 1360, 1362 (Fla. 1986); see also id. at 1362 ("A comparison of the original trial record clearly and conclusively refutes any claim that there was any constitutional infirmity in the trial. The same is true of the appellate process. Although Mann urges vehemently numerous grounds for habeas corpus relief, each is either refuted or is insufficient for relief.") If this language does not demonstrate that the Florida Supreme Court ruled on the merits, we have lost the Great Writ's role as an instrument for vindication of federal rights. The State's effort to have this Court "apply state procedural rules as though it stood in the state court's shoes," Euell v.



Wyrick, 675 F.2d 1007, 1008 (8th Cir. 1982), is countenanced by neither policy nor the Constitution. See also Ulster County v. Allen, 442 U.S. at 155; Spencer v. Kemp, *supra*; Oliver v. Wainwright, 795 F.2d 1524, 1528-29 (11th Cir. 1986); Walker v. Engle, 703 F.2d 959, 966 (6th Cir. 1983) ("Sykes rule does not apply when it is not clear that the state appellate court has applied a procedural bar" [emphasis in original]); Campbell v. Wainwright, 738 F.2d 1573, 1577 (11th Cir. 1984) (same).

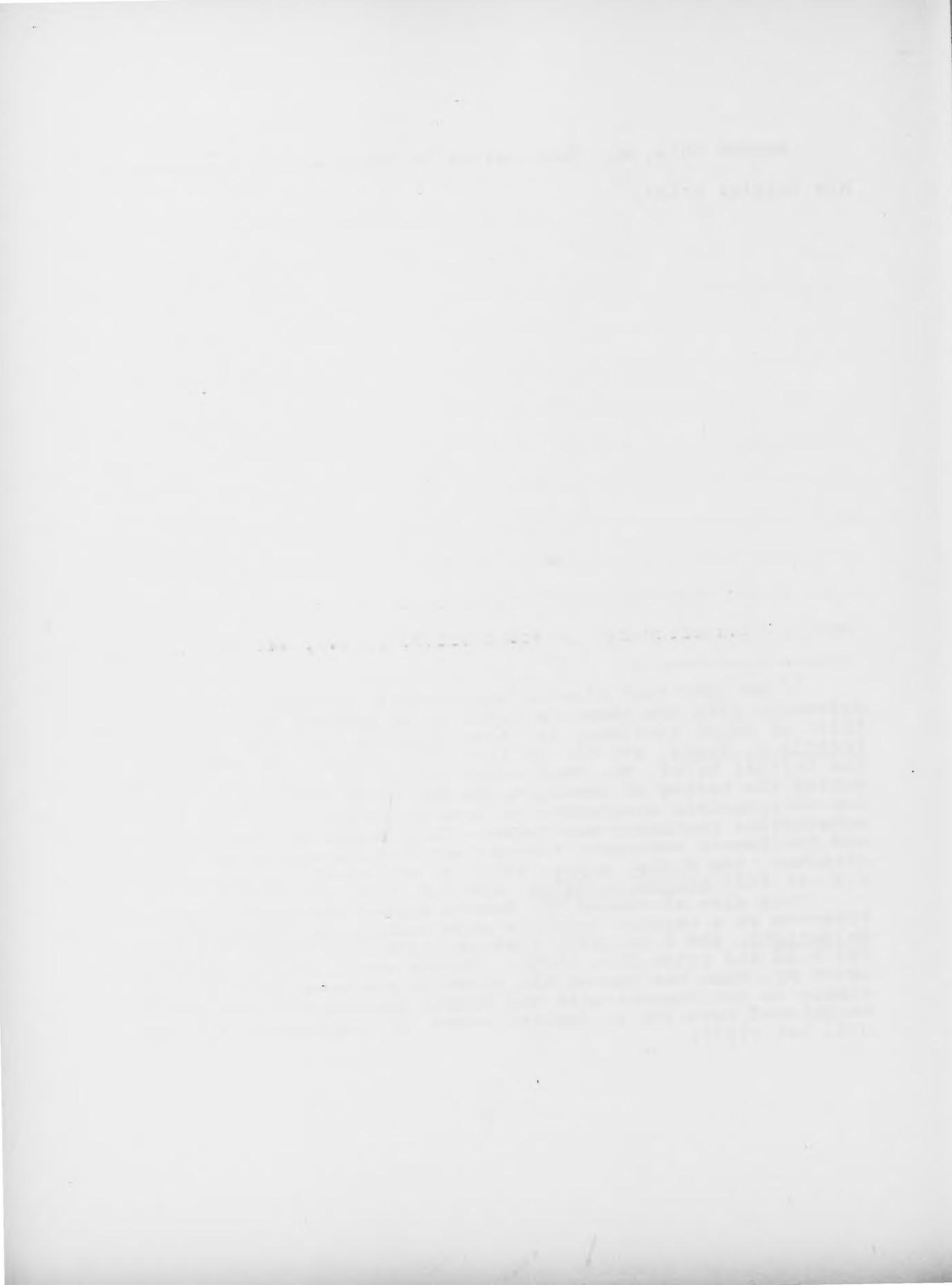
After all, "[i]t is not too much to require the state court to be explicit when applying its procedural default rules." Mann v. Dugger, 817 F.2d 1471, 1488 (11th Cir. 1987) (Clark, J., concurring). See also Michigan v. Long, 463 U.S. 1032 (1983); Ulster County v. Allen, *supra*; Spencer v. Kemp, *supra*.¹⁰

¹⁰ What the Florida Supreme Court never said in Mr. Mann's case is noteworthy. During the litigation of Mr. Mann's state-court post-conviction actions, that court never used the language which it uses in every other case in which it applies a procedural bar--that claims would not be heard because they "should have been raised" on direct appeal or "were not preserved" by objection at trial. See, e.g. James v. State, 489 So.2d 737, 738 n.1 (Fla. 1986); Porter v. State, 478 So.2d 33, 36 (Fla. 1985). The Florida Supreme Court, after all, knows how to apply a procedural bar -- when it believes a claim should be foreclosed by the application of a default rule, it will clearly say so. See, e.g., James, Porter. It did not clearly say so here.

" Beyond this, Mr. Mann relies on the analysis presented in his initial brief.¹¹

¹¹ We note that Florida specifically provides a criminal defendant with the absolute right to be present at all stages of trial at which testimony is taken. See Fla. R. Crim. P. 3.180; Francis v. State, 493 So. 2d 1175 (Fla. 1982). As explained in the initial brief, Mr. Mann never waived his right to be present during the taking of testimony at the "jury viewings." The jury was nevertheless shepherded to five different locations, and substantial testimony was taken. This denied Mr. Mann his Sixth and Fourteenth amendment rights, and his State-created liberty interest. See Hicks, supra, 447 U.S. at 346-47; Vitek, supra, 445 U.S. at 488; Hewitt v. Helms, 459 U.S. 460, 467 (1983).

This also abrogated Mr. Mann's Eighth Amendment rights. Presence at a capital trial is nonwaivable. Cf. Proffitt v. Wainwright, 685 F.2d 1227, 1256-58 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983). In any event, the procedures by which Mr. Mann was denied his right to presence in this case simply do not comport with the Eighth Amendment's requirement of heightened scrutiny in capital cases. Cf. Gardner v. Florida, 430 U.S. 349 (1977).



III

THE DEATH SENTENCE IMPOSED ON MR. MANN WAS
OBTAINED IN SUBSTANTIAL RELIANCE ON AN
UNCONSTITUTIONAL PRIOR CONVICTION, IN
VIOLATION OF THE EIGHTH AND FOURTEENTH
AMENDMENTS

Mr. Mann relies on the arguments presented in his initial brief. We note, however, that Judge Johnson's panel opinion analysis was accurate: the Florida Supreme Court had not, prior to Mr. Mann's second direct appeal, pronounced a procedural bar against raising this type of claim in collateral proceedings. Adams v. State, 449 So.2d 819 (Fla. 1984), the case cited by the State as demonstrating that "Judge Johnson's statement that the Florida Supreme Court has not previously pronounced on this matter," was erroneous (State's Brief, p. 54), was decided two years after Mr. Mann's second direct appeal. See Mann v. State, 420 So. 2d 578 (Fla. 1982). The State does not attempt to explain, for obvious reasons, how this decision could have "fairly apprised" Mr. Mann in 1982 that his claim would be procedurally barred if not asserted on direct appeal. See Spencer, supra; Wheat v. Thigpen, supra. It is black letter habeas law that the novel application of a procedural bar is an insufficient obstacle to a petitioner's right to be heard on a federal claim, Spencer; Wheat, and that bars that are not fairly, clearly and evenhandedly applied to all litigants cannot be deemed "adequate and independent." Henry v. Mississippi, 379



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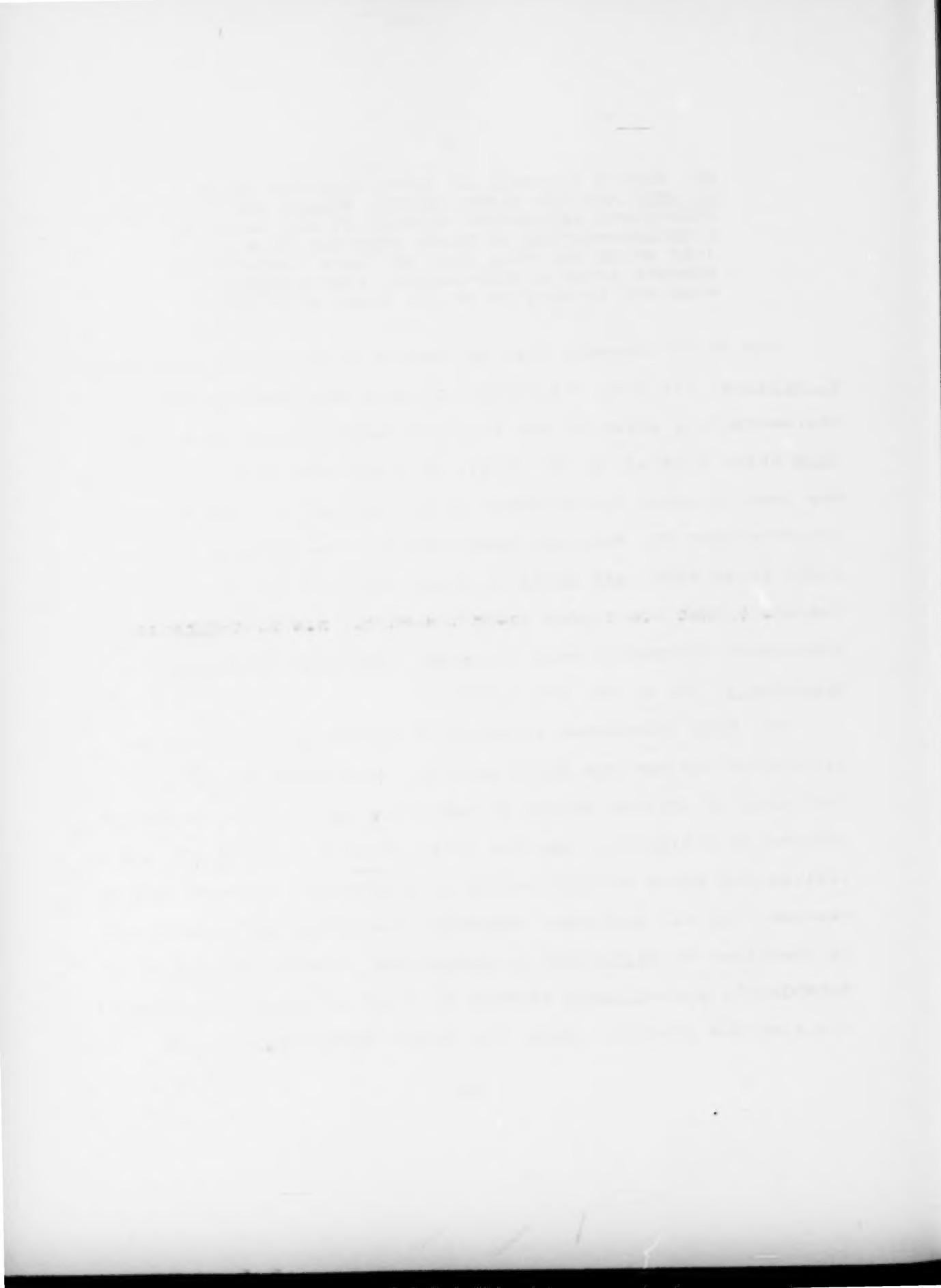
U.S. 433, 447-48 (1958); Tollett v. Henderson, 411 U.S. 258, 266 (1973); Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975); NAACP v. Alabama, 347 U.S. 449, 455 (1958); James v. Kentucky, 104 S. Ct. 1830, 1835 (1984). It is this type of unconstitutional bar which the State requests that this Court apply in Mr. Mann's case.¹²

¹² Two other matters should be noted with regard to the State's contentions on this claim. First, the assertion that the Mississippi conviction, Mann v. State, 490 So. 2d 910 (Miss. 1986), rests on "adequate and independent state grounds" (State's Brief, p. 53) is simply wrong. That conviction rests precisely on the inadequate and nonindependent state bar condemned by the Fifth Circuit in Wheat v. Thigpen. Second, Zant v. Stephens, 462 U.S. 862 (1983), United States v. Tucker, 404 U.S. 443 (1972), and Burgatt v. Texas, 389 U.S. 109 (1967), involve "misinformation of constitutional magnitude" -- the "misinformation" which violates the Eighth Amendment and Due Process Clause is not limited solely to "uncounseled" prior convictions, and Florida had not so restricted a criminal defendant's challenges in the past (as discussed in Mr. Mann's initial brief).

MR. MANN'S SENTENCE OF DEATH VIOLATES DOYLE V. OHIO AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT WAS BASED ON A RECOMMENDATION OF DEATH OBTAINED FROM A JURY WHICH WAS TOLD THAT MR. MANN "SHOWED" NO REMORSE AFTER A POST-ARREST, POST-MIRANDA INVOCATION OF HIS RIGHT TO SILENCE

The State concedes that Mr. Mann's post-arrest, post-Miranda v. Arizona, 384 U.S. 436 (1966), silence was used against him at the sentencing phase of his trial to rebut mitigating evidence. (See State's Brief, p. 57 ["[i]t is clear that Brooks' testimony was used to rebut the evidence in mitigation"]). The State thus concedes that Mr. Mann was penalized for the exercise of his right to silence, see Doyle v. Ohio, 426 U.S. 610 (1976), and therefore that his rights under the Fifth, Sixth, Eighth and Fourteenth amendments were violated. See also Wainwright v. Greenfield, 106 S. Ct. 634 (1986).

Mr. Mann introduced evidence of his mental condition as mitigation against the death penalty. The State put on the testimony of officer Brooks to rebut the psychiatric testimony offered in mitigation (see ROA 2374; State's Brief at 57) and as affirmative proof of aggravation -- purportedly to show lack of remorse. In all pertinent respects, therefore, Mr. Mann's case is identical to Wainwright v. Greenfield. There, the use of a defendant's post-Miranda silence to rebut an insanity defense violated due process. Here, the Eighth Amendment was also



violated. The use of post-Miranda silence under these circumstances is precisely what Doyle condemned:

The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Greenfield, 106 S.Ct. at 639.

It is not clear just how Mr. Mann put his post-Miranda behavior in Mississippi at issue in his Florida capital sentencing proceeding (See State's Brief at p.57). It is clear that a defendant does not do so by asserting a mental health defense. Greenfield, supra. It is also clear that the only circumstances under which "Doyle does not prohibit the prosecution from presenting post-arrest [and post-Miranda] behavior [silence] to refute the defendant's testimony" (State's Brief at 57) is when a defendant testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. Doyle, 426 U.S. at 621 n.11. This is plainly not the case here.

Mr. Mann's post-Miranda silence was used both to rebut mitigation and to establish aggravation. It was used to sentence him to death. Under such circumstances, the Doyle violation which occurred here cannot be harmless error. The jury heard it and the prosecutor forcefully argued it. It could not but have affected the jury, and, as discussed earlier, the jury's verdict is critical.¹³

¹³ With regard to the State's procedural default contentions, Mr. Mann respectfully refers the Court to the discussion presented in Claim II, supra. That analysis applies with full force to Mr. Mann's Doyle/Greenfield claim.

CONCLUSION

The district court's denial of the writ should be reversed; Mr. Mann's case should be remanded for an evidentiary hearing; and Mr. Mann should be granted the habeas corpus relief he seeks.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Gary Welch and Michael Kotler, Assistant Attorneys General, Department of Legal Affairs, Park Trammell Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602, this 7th day of December, 1987.

Gilbert Diament

Attorney